86-417

No.

Supreme Court, U.S.
FILED
SEP 11 1986
JOSEPH F. SPANIOL, JR.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

NORMAN GARDNER, RAMONA WALHOF, JOHN CHEADLE,
*Petitioners,*

vs.

JOHN V. EVANS, MARTY PETERSON, LAWRENCE W. BARNES,
JACK UGAKI, HOWARD BARTON,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF IDAHO

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September 11, 1986

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## QUESTIONS PRESENTED

1. Can membership or association in a lawful, civil rights organization of the blind warrant either dismissal from public employment or the deliberate exclusion from meetings in which one is entitled to participate as an incident of holding office as chairman of a state commission?

2. Can a public employee be fired in retaliation for expressing her views in a press release on the proper structure of the state agency she directs?

3. Can a public employee be fired in retaliation for voicing support of his supervisor in a public meeting?

4. Was summary judgment against petitioners Gardner and Walhof inconsistent with the "disparate impact" standard of 29 U.S.C. §794 and the regulations promulgated thereunder and, if so, what remedies are available?

5. Did summary judgment against petitioners Walhof and Cheadle deprive them of property in violation of the Due Process Clause of the Fourteenth Amendment?

## LIST OF PARTIES

Petitioners are Norman Gardner, individually and in his official capacity as chairman of the Idaho Commission for the Blind representing the Idaho Commission for the Blind; Ramona Walhof, individually and in her official capacity as director of the Idaho Commission for the Blind; John A. Cheadle, individually and in his capacity as deputy director of the Idaho Commission for the Blind.

Respondents are John V. Evans, individually and in his official capacity as Governor of the State of Idaho; Marty Peterson, individually and in his official capacity as director of the Division of Financial Management in the Idaho Office of the Governor; Lawrence W. Barnes and Jack Ugaki, individually and in their official capacities as members of the Idaho Commission for the Blind; and Howard Barton, individually.

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF IDAHO

---

The petitioners Norman Gardner, Ramona Walhof and John Cheadle respectfully pray that a writ of certiorari issue to reveiw the final judgment and remittitur of the Idaho Supreme Court entered in the above styled proceeding on June 13, 1986.

### OPINIONS BELOW

The memorandum opinion of the Idaho Supreme Court is reported at 719 P.2d 1185 (Idaho 1986) and is reprinted *infra* at A. 6. The opinions of the district court for Ada County are not reported and appear in the Appendix at A. 7-17.

## JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257(3) to review the final judgment and remittitur entered by the Idaho Supreme Court on June 13, 1986.*

## STATUTES INVOLVED

**The statutes involved in this case are The United States Constitution, amends. I and XIV; 29 U.S.C.** § 794; 42 U.S.C. §§ 1983 and 1985(3); and 34 C.F.R. § 104.4 all of which are reprinted in Appendix D at A. 56-58.

## STATEMENT OF THE CASE

On September 21, 1982, Howard Barton announced his resignation effective December 31, 1982 as director of the Idaho Commission for the Blind (I.C.B.).[1] On September 28, 1982, Ramona Walhof, a blind person, was hired as director of the I.C.B.[2] Barton, a sighted person, was highly displeased with Norman Gardner, the blind chairman of the I.C.B., and with Walhof because of the swiftness with which he was replaced.[3]

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* The Office of the Clerk of the Idaho Supreme Court advised petitioner's counsel, Mr. Le Clercq, in June 1986 that under Idaho practice, the final judgment of the Idaho Supreme Court consists of the entry of the remittitur and other docket entries made June 13, 1986 into the Idaho court's computerized register of actions. A. 1-5. Idaho practice is governed by IDAHO APP. R. 38 at A. 55. *See Solomon v. State Tax Commission of New York,* 278 U.S. 484, 486 (1929) and *Puget Sound P. & L. Co. v. King County,* 264 U.S. 22, 23-25 (1924).

[1] Barton Dep. 35-36. A copy of all portions of the record relied upon in this Petition has been lodged with the Clerk of The Supreme Court of the United States.

[2] Gardner Dep. 9-15.

[3] Barton Dep. 35-36, 44. Wardle Dep. 7.

### 1. The Conspiracy Against Gardner, Walhof and Cheadle Because of their N.F.B. Affiliation

Barton enlisted his friend, Brian Wardle, an unemployed former I.C.B. client, as an ally in a vendetta against Gardner, Walhof and the National Federation of the Blind (N.F.B.).[4] The opening salvo came in a letter to the Governor of Idaho, a copy of which was published on November 11, 1982 in the Boise *Idaho Statesman*.[5] By innuendo, the letter attacked N.F.B. leadership as "suspect," "unethical," and "very quick and secretive."[6] The identification of Walhof as "from Baltimore, Maryland" was code language linking her to Gardner, president of the National Federation of the Blind of Idaho (N.F.B.I.) and a member of the N.F.B. national board.[7]

Because of her N.F.B. affiliation, opposition to Walhof as administrator of the Commission began "for some of us on the very first day."[8]

Barton and Wardle orchestrated "an active educational campaign" among their followers, the focus of which was the Office of the Governor and the two non-N.F.B. members of the I.C.B., Larry Barnes and Jack Ugaki.[9]

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[4] Barton Dep. 43-46. Wardle Dep. 4, 6-7 and Ex. 3 at A. 31. Wardle 2 Dep. 20-21. Lyon Dep. 11-25.

[5] Wardle Dep. Ex. 3 at A. 31.

[6] *See* Wardle Dep. 8, Barton Dep. 42, Evans Dep. 17. Because of Gardner's prominence as a national leader in the N.F.B., the attacks on Gardner were often understood as attacks on the organization with which he was so closely identified.

[7] *See e.g.*, Letter to Legislators from Brian Wardle, December, 1983 par. 3 at A. 34 and "I.B.I.'s Ten Points" par. 2 at A. 36.

[8] Lyon Dep. 20, 11-25. Barnes Dep. 27. Barton Dep. 37, 43-45. Wardle Dep. 6-10.

[9] Wardle 2 Dep. 32-33, 4-5, 10, 18-28. Lyon Dep. 18-25. Barton Dep. 9. Wardle Dep. 10. Evans Dep. 17.

Barton and Wardle participated in an unsuccessful attempt to have Walhof removed in the winter of 1983 when she had been director for only several months.[10]

Embittered as a result of Barton's exclusion from voting privileges at the 1983 N.F.B.I. convention and their unsuccessful effort to unseat Gardner as N.F.B.I. president,[11] Barton and Wardle led the anti-Gardner faction of the N.F.B.I. in forming a new organization, the Independent Blind of Idaho (I.B.I.) in the fall of 1983.[12] The I.B.I.'s express goals included the removal of Walhof and Gardner from positions of leadership in the I.C.B. because of their N.F.B. affiliation.[13]

The organized opposition to Gardner, Walhof and Cheadle because of their N.F.B. affiliation became more strident in December 1983 and January 1984.[14] In January 1984 the I.B.I. board created and circulated a numbered, ten point document ("I.B.I.'s Ten Points") to "two of the Board members . . . . Mr. Barnes and Mr. Ugaki."[15] Gardner, the I.C.B. chairman, was not sent a copy of this document because of his N.F.B. affiliation.[16] The second paragraph of this I.B.I. document charged that "[t]hose in administrative positions [at the I.C.B.] are all members of the National Federation of the Blind of Idaho."[17] *See also* A. 34-35, (letter from Wardle to Idaho Legislature condemning the N.F.B.'s dominance in Idaho).

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[10] Barton Dep. 37. Lyon Dep. 15, 19. Barnes Dep. 27. *See also* A. 37 at par. 6.

[11] Barton Dep. 39, 46.

[12] Barton Dep. 39, 41, 46. Lyon Dep. 12-13, 25.

[13] Boyd Dep. 18. Wardle 2 Dep. 29. R. 159-60.

[14] *See* A. 34-38.

[15] Wardle Dep. 46-48 and A. 36-38.

[16] Ugaki Dep. 48-49, 88-89.

[17] A. 35.

There was substantial pressure on Ugaki to join in the movement against the N.F.B.[18] Wardle and Barton lobbied Evans to appoint Ugaki to the I.C.B. board and then lobbied the legislature for his confirmation.[19] Wardle had discussed the "I.B.I.'s Ten Points" with Ugaki who, prior to his confirmation, acknowledged that "something had to be done" and that the Board would deal with the questions raised.[20] The "I.B.I.'s Ten Points" were subsequently used as a "fact sheet of information why we [the I.B.I.] felt Ugaki should be appointed."[21]

By January 1984, Barton, Wardle and their followers had convinced the governor of Idaho, Evans, and the two sighted non-N.F.B. members of the I.C.B., Barnes and Ugaki, that the N.F.B. had gained control of the Idaho Commission for the Blind and that N.F.B. members should be removed from posetions of leadership at the I.C.B.[22]

**2. The Walhof Press Release**

It was "long-standing Commission policy to oppose reorganization of the Commission" and Walhof had been told that it was her "job to carry out this policy."[23] Walhof accordingly expressed her concern and opposition on behalf of the I.C.B. to Governor Evans in a three page letter[24] and a personal meeting.[25]

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[18] *See* generally Ugaki Dep., Barton Dep., and Wardle Deps.

[19] Wardle Dep. 12, 25, 48-52. Barton Dep. 21, 32.

[20] Wardle Dep. 50-52.

[21] Wardle Dep. 48.

[22] Evans Dep. 6, 36-39. Barnes Dep. 46, 48, 52-53, 79. Ugaki Dep. 39, 64. Wardle Dep. 16, 25-26, 48. Jones Dep. 22. Peterson Dep. 22-43. *See also* A. 52.

[23] R. 247. Gardner Dep. 10.

[24] R. 166-68.

[25] Peterson Dep. 17, 19-20. R. 157, 185. Evans Dep. 19-21.

On January 5, 1984, Walhof, a public critic of Evans' official conduct, issued a press release attacking Evans' reorganization plan.[26] Peterson obtained a copy of the Walhof release in the early afternoon of January 5, 1984 and "considering the content" took it to Evans "pretty soon after" he got it.[27] Peterson's reaction to the Walhof press release was "emotional" and characterized by "disbelief."[28] Evans was "very upset" by the Walhof release and repeatedly characterized it as a "misrepresentation" of his position.[29]

Evans wanted "an appropriate apology" from Walhof,[30] and Peterson drafted a resolution for adoption by the I.C.B. board in which Walhof was asked to retract the statement and "issue a formal apology to the Governor."[31] A compelling inference that the document drafted by Peterson and the strategy for its implementation reflected Evans' position is suggested by several factors: (1) the similarity between the document and Evans' stated position, (2) the proximity in time within which the document was drafted following the Evans-Peterson meeting of January 5, 1984 and (3) the superior-subordinate relationship between Evans and Peterson.

Private meetings with Barnes and Ugaki, the two sighted, non-N.F.B.[31] members of the I.C.B., were immediately scheduled by Peterson and Parsley. Barnes' response to Peterson's visit on the morning of January 6, 1984 was that "I would probably ask Mrs. Walhof to resign."[33]

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[26] A. 43-44. *See also* A. 45.

[27] Peterson Dep. 29-30.

[28] Peterson Dep. 28.

[29] Evans Dep. 31-41.

[30] Evans Dep. 34.

[31] A. 54.

[32] Ugaki Dep. 49-54. Parsley Dep. 14. Peterson Dep. 23, 31-32, 37. Barnes Dep. 62-63.

[33] Barnes Dep. 62-63. Parsley Dep. 14 and Peterson Dep. 31-32.

On the afternoon of January 5, 1984 Ugaki, a then-unconfirmed gubernatorial appointee, was telephoned by the Governor's office and advised by Peterson that "the Governor was not happy with that [Walhof] news release."[34] On January 5, 1984, at 7:05 p.m., Ugaki telephoned the residence of Larry Barnes and spoke for three minutes. At 8:44 p.m. Ugaki telephoned Barton and had a twenty-seven minute conversation.[35]

On Saturday, January 6, 1984 Ugaki flew to Boise and attended a meeting at the Governor's office concerning the Walhof press release.[36] Ugaki's discussions with respect to the Walhof press release were mixed with frequent discussions of "the confirmation process."[37]

Significantly, Gardner, the chairman of the Idaho Commission for the Blind, was not contacted by the Governor's office in January 1984.[38] The only plausible explanations for Gardner's exclusion are his blindness, his philosophy of blindness or his N.F.B. membership and association.

On January 12, 1984, Evans announced he would abandon his plan to consolidate the Idaho Commission for the Blind into the Department of Health and Welfare because of the "hue and cry within the blind community."[39] Walhof's response was: "I am thrilled and blind people are too."[40]

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[34] Ugaki Dep. 49-54.

[35] Graham Dep. 8 and Ex. 9.

[36] Ugaki Dep. 50-54.

[37] Peterson Dep. 37. Parsley Dep. 20.

[38] Peterson Dep. 42. R. 177-79. *See* A. 52.

[39] A. 46.

[40] A. 46.

But the events leading to Walhof's dismissal had already been set in motion by Evans and Peterson at their meeting on the afternoon of January 5, 1984.[41] As Peterson stated: "How long do you think I would have my job if I lied about the Governor and what he intended to do?"[42]

At the public meeting on February 3, 1984, Walhof was dismissed.[43] Barton had justified Walhof's dismissal because "one [organization] at the present time . . . has the controlling interest in the Commission of the Blind and that's the National Federation of the Blind."[44]

John Cheadle spoke at the public meeting of February 3, 1984.[45] Barton summarily dismissed Cheadle several hours later because of Cheadle's remarks at the public meeting.[46]

Walhof's forced resignation or dismissal was planned by Barnes and Ugaki in a series of "private meetings" and telephone conversations in January and February 1984 from which Gardner, chairman of the I.C.B., was intentionally excluded because of his blindness or N.F.B. affiliation.[47] Gardner's exclusion in January and February 1984 from meaningful participation in the deliberations of the state blindness agency of which he was chairman is especially egregious because that agency is a recipient of federal funds and subject to 29 U.S.C. § 794,[48] and because Gardner's appointment satisfied the state re-

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[41] Peterson Dep. 22-30. Barnes Dep. 62-63. Ugaki Dep. 50-54.

[42] R. 177-79. Peterson Dep. 40, 43.

[43] R. 13, 24, 123, 246.

[44] R. 241.

[45] R. 220-21.

[46] Barton Dep. 32-33.

[47] Ugaki Dep. 9, 13-14. R. 302-03. Barnes Dep. 56, 61. Barton Dep. 6-9. Peterson Dep. 22-46.

[48] Gardner Dep. 58.

quirement that at least one member of the Idaho Commission be blind.[49]

By January 1984, Barnes and Ugaki characterized the blind community in Idaho as divided into "warring factions."[50] Walhof was faulted by Ugaki for lacking "the capability . . . of bridging the gaps" between the two factions.[51] This justification is clearly fictional, since Ugaki and Barnes were even then conspiring to replace Walhof with Barton, a key figure in the I.B.I. whose hostility to the N.F.B. was well established.

On February 6, 1984 petitioners filed suit in the state district court against Barnes, Ugaki and Barton under the state open meeting law.[52]

On February 24, 1984 plaintiffs amended their complaint naming Evans and Peterson as additional defendants.[53] In the amended complaint, plaintiffs alleged a conspiracy (pars. 19 and 24) and asserted violation of their rights of due process (par. 22) and of speech and association (pars. 18-26). Petitioners contended that the amended complaint entitled them to relief under 29 U.S.C. § 794 and 42 U.S.C. §§ 1983, 1985 and 1988.[54]

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[49] IDAHO CODE ANN. §67-5403 (1980).

[50] Barnes Dep. 52. R. 244. Ugaki Dep. 13-14, 95-97. Wardle Dep. 25-27, 32-33 and Ex. 11 at A. 36-38. Barnes Dep. 25 (some of letters of complaint to Barnes were from the same people) Barnes' decision to fire Walhof was in part a response to a "bunch of disgruntled people," despite the fact that he had not yet found "out what was going on." Barnes Dep. 20, 52-55. R. 244. Barnes and Ugaki ignored the substantial support in favor of Walhof at the I.C.B. and in the blind community. A. 47-48.

[51] Ugaki Dep. 58. R. 241. Barton Dep. 37, 39, 45-46. Barnes Dep. 57.

[52] R. 3.

[53] A. 23.

[54] 1 T. 129. 2 T. 2-3. 1 T. 98-99.

Petitioners' requests for relief under 29 U.S.C. § 794 and under 42 U.S.C. §§ 1983, 1985 and 1988 were briefed extensively in the state courts.[55] At oral argument in the Idaho Supreme Court on February 11, 1986, counsel for respondents urged the Idaho court to reach all issues presented by petitioners and expressly waived earlier objections to petitioners' requests for relief under §§ 1983, 1985 and 1988.[56]

On August 31, 1984 the district court granted respondents' motion for summary judgment against Walhof and Gardner.[57]

On January 17, 1985, the district court granted respondents' motion for summary judgment against Cheadle.[58]

The district court entered judgment for defendants on January 31, 1985.[59]

Petitioners appealed to the Idaho Supreme Court which filed a memorandum opinion on May 22, 1986.[60] The final judgment and remittitur of the Idaho Surpreme Court were entered against peitioners on June 13, 1986.[61]

This petition for certiorari is to review petitioners' federal claims, all of which were decided adversely to petitioners by the Idaho Supreme Court and are now ripe for review by the Court.

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[55] *See* Appellants' Brief filed in the Idaho Supreme Court a copy of which has been lodged with the Clerk of the Supreme Court of the United States.

[56] Remarks by Michael Spink, Esquire, counsel for respondents.

[57] A. 12.

[58] A. 10.

[59] A. 7.

[60] 719 P.2d 1185 (Idaho 1986).

[61] A. 1-2, 5

## REASONS FOR GRANTING THE WRIT

### I. The Supreme Court Of Idaho Erred In Affirming Summary Judgment Against Petitioners, Thereby Refusing To Extend 42 U.S.C. § 1985(3) To Members Of A Constitutionally Protected Association Or To Members Of A Congressionally Protected Class Of Blind Persons.

This case squarely presents important, unresolved questions concerning 42 U.S.C. § 1985(3). First, does § 1985(3) afford protection to members of political associations such as the N.F.B. from conspiracies by those attempting to deprive N.F.B. members of their civil rights? Second, this case presents a question as yet unresolved by this Court as to whether blind persons are entitled to use the remedial provisions of § 1985(3) to obtain redress against conspiracies directed against them as a class. Third, this Court has never reached the question of whether § 1985(3) extends to cases where "Congress had indicated through legislation that the class required special protection." *Schultz v. Sunberg,* 759 F.2d 714, 718 (9th Cir. 1979).

In prior decisions on the extent of protection granted by 42 U.S.C. § 1985(3), this Court has carefully limited its holdings to the narrow facts of each case. In *Griffin v. Breckenridge,* 403 U.S. 88, 102 (1971), where the plaintiffs were Negroes, this Court expressly left open the question of whether the requisite "racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action," could be found in conspiracies against classes which are not defined by race. In *United Brotherhood of Carpenters & Joiners v. Scott,* 463 U.S. 825 (1983), this Court held that the prohibitions of § 1985(3) did not reach conspiracies motivated by economic or commercial animus, but expressly refused to decide whether § 1985(3) protected political groups, or any other non-racial class.

While it is thus clear that racial groups are protected from conspiracy and economic groups are not, other unfortunate victims of conspiracy have been left adrift in the unmapped waters

between *Griffin* and *Scott*. With this important question still undecided, the lower federal courts have expressed confusion and uncertainty. *See, e.g., Harrison v. KVAT Food Management, Inc.*, 766 F.2d 155 (4th Cir. 1985) ("The result has been a wide range of decisions exhibiting conflicting views..."); *Grimes v. Smith*, 776 F.2d 1359 (7th Cir. 1985) ("The lower courts have struggled to fill in the gaps, yet the scope of § 1985(3) could hardly be called clear.")

Association with the National Federation of the Blind is exactly the sort of class association which ought to be protected under § 1985(3). Protection of interest-group affiliation, unlike the political party affiliation rejected in dicta in *Scott*, would not "go far toward making the federal courts...the monitors of campaign tactics..." 463 U.S. at 836. There are no campaign tactics or elections at issue here. The issue here is freedom to belong, without harassment through conspiracy by government officials, to an association which espouses one's own heartfelt philosophies.

There is substantial evidence in the record that respondents conspired against petitioners because of their political affiliation with the N.F.B.[62] There was a web of personal and political friendships between respondents which provided both the motive and the opportunity for a conspiracy.[63] Each of the respondents had reason to oppose petitioners because of their membership in the N.F.B.[64] Respondent Barton was a member of, and Respondent Ugaki a sympathizer with, the Independent

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[62] See *infra*, notes 63-65. *See also* A. 52.

[63] Barton Dep. 32. Ugaki Dep. 51-55. Wardle Dep. 12, 17, 26, 30, 33-34, 47. Wardle 2 Dep. 21. Peterson Dep. 37-38. Parsley Dep. 20, 31.

[64] Barton Dep. 39, 41, 45-46. Barnes Dep. 79-80. Evans Dep. 6, 37. Those who most strongly supported Ugaki were members of the I.B.I., which expressly opposed the N.F.B. Barton Dep. 39. Wardle Dep. 17. Lyon Dep. 15, 18.

Blind of Idaho, a rival organization to the N.F.B. with published goals which specifically targeted N.F.B. members for removal from the Commission.[65]

There is evidence in the record that the conspiracy against petitioners was further motivated by animus against assertive and independent blind persons. Petitioner Gardner was the only blind member of the three-person Board of Commissioners. As found by the trial court, respondents Ugaki and Barnes met secretly, purposely excluding Gardner, while discussing important Board business, thereby effectively depriving him of his position as Chairman of the Board.[66] Petitioner Walhof is blind, and was immediately replaced as Director of the Commission by respondent Barton, who is sighted.

As in conspiracies based on racial discrimination, discrimination against blind people represents an attempt to keep a discrete class of persons in its place, unable to interfere with the comfortable superiority of the majority. Walhof and Gardner, as blind persons who broke away from the role of dependence created for them by a condescending sighted majority, threatened respondents, who would rather not have the blind organized as a viable force, or taking jobs of sighted people when society is perfectly willing to appease them with welfare and social security checks. Like racial minorities, blind persons are chronically unemployed and underemployed.[67] Blindness, like race, is an immutable condition. As blacks have found, the paucity of numbers of blind persons ensures that, if they are kept politically isolated, they will be politically impotent.

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[65] Barton Dep. 39. Ugaki Dep. 38. Wardle 2 Dep. 32. "I.B.I.'s Ten Points" at A. 36-38.

[66] Gardner Dep. 32, 33, 37, 41, 55. Barnes Dep. 51-52, 59. Ugaki Dep. 9.

[67] Seventy per-cent of the employable blind are unemployed. *See* Walhof's status report to the Governor, at Wardle Dep. Ex. 2.

It is an unfortunate historical accident that the needs of many non-racial groups had not yet come to the attention of Congress when the Civil Rights Statutes were passed. Congress might have chosen to provide express protection for minorities such as the handicapped. Yet it is also true that while Congress could have expressly limited the Civil Rights Statutes to protection of racial minorities, it did not choose to do so. Furthermore, whereas Congress has specifically provided formidable protective machinery under the National Labor Relations Act for the economic class in *Scott*, § 504 of the Rehabilitation Act provides no such formidable protection for handicapped persons.

Pursuant to *Scott*, the Ninth Circuit has consistently held that § 1985(3) protection extends to cases where "Congress has indicated through legislation that the class required special protection." *Schultz v. Sundberg*, 759 F.2d 714, 718 (9th Cir. 1985). *See also DeSantis v. Pacific Tel. & Tel. Co., Inc.*, 608 F.2d 327 (9th Cir. 1979). This extension, while avoiding the general federal tort law specifically rejected by this Court in *Griffin*, recognizes that there are other classes besides racial minorities whose plights have come to the attention of Congress since the enactment of the Civil Rights Statutes. Congress recognized in 1973 that handicapped persons require the special protection of the federal government against discrimination. 29 U.S.C. § 794 (1982). Handicapped persons should likewise be protected from conspiracies against them based on their handicaps.

## II. The Supreme Court Of Idaho Erred In Affirming Summary Judgment Against Petitioners Walhof And Cheadle On Their First Amendment Freedom Of Speech Claims, Thereby Refusing To Grant Judicial Protection To Speech Which Constituted An Important Matter Of Public Concern.

The holdings by the courts below fly in the face of consistent holdings by this Court in matters of freedom of speech. In *Pickering v. Board of Education*, 391 U.S. 563 (1968), this

Court set forth the balancing test which is to be applied to determine whether an employee's speech is protected by the Constitution:

> The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters lf public concern and the interest of the state, as an employer, in promoting the efficiency of the public service it performs through its employees.

391 U.S. at 568. Under this test, both Walhof's press release and Cheadle's speech in support of Walhof are clearly protected by the First Amendment.

Walhof's press release brought the Governor's plan for reorganization to the attention of the community. Her public insistence that reorganization would hurt rather than help the blind of Idaho opened the Governor's plans to public debate. Had the Governor proceeded with his reorganization without public awareness or debate, the members of the blind community would have been effectively disenfranchised. That kind of secret government activity is exactly the sort of conduct this Court has repeatedly forbidden as anathema to democracy. *See e.g. New York Times v. Sullivan,* 376 U.S. 254 (1964).

As the public interest in hearing what Walhof had to say was high, the corresponding state interest in suppressing her speech was low. None of the factors present in *Connick v. Myers,* 461 U.S. 138 (1983) is present in the case of Walhof's press release. The Court in *Connick* pointed out that "[w]hen close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." 461 U.S. at 151-152. Governor Evans was not "a person with whom [Walhof] would normally be in contact in the course of [her] daily work."[68] *Pickering,* 391 U.S. at 569-70.

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[68]. Evans Dep. 15, 18.

The Board, with whom Walhof would have extensive contacts, was in complete accord with her on the issue of reorganization.[69] There is no evidence that her co-workers disagreed with her on this issue, or that there would be any resulting tensions leading to inefficiencies in the office.

In holding that there was "nothing in the record" to indicate that Walhof would have been fired regardless of her press release, the Idaho Supreme Court ignored substantial evidence in the record, ignored the issue of respondents' credibility, and ignored this Court's holding in *Mt. Healthy Board of Education v. Doyle,* 429 U.S. 283 (1977). *Mt. Healthy* placed the final burden on defendants to show "by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the protected conduct." 429 U.S. at 287. There is no such preponderance of the evidence in this record. The School Board in *Mt. Healthy* was able to enumerate, without contradiction, specific instances of unprotected and unacceptable behavior which contributed substantially to its decision to terminate the plaintiff. The Idaho Supreme Court cited only general reasons for Walhof's dismissal: "she had offended too many people" and "too many people had quit their jobs." Even these generalities are contradicted in the record.[70] Federal courts were unconvinced by similar general accusations in *Givhan v. Western Line Consolidated School District,* 439 U.S. 410 (1979). "In an effort to show that its conduct was justified, respondent school district introduced evidence of, among other things, a series of private encounters between petitioner and the school principal in which petitioner allegedly made 'petty and unreasonable demands' in a manner variously described . . . as 'insulting,' 'hostile,' 'loud,' and 'arrogant.' " 439 U.S. at 412. The district court found that the actual incidents were insuffi-

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[69] Ugaki Dep. 51-55. Gardner Dep. 10. R. 247.

[70] Barnes Dep. 29. Minutes of Feb. 3, 1984 meeting of I.C.B., R. 217-46.

cient to justify Givhan's termination, and this Court agreed. Furthermore, the determinations in both *Givhan* and *Mt. Healthy* were the result of bench trials. The court had the opportunity to judge the demeanor of the various parties and witnesses in determining whether there was in fact sufficient cause for dismissal. The court here had no such opportunity. Its finding was based on the depositions of people whose own credibility was in issue.[71] The Idaho courts ignored the considerable evidence in the record that Walhof was actually excellent at her job, from which the reasonable inference may be drawn that there was no other reason to fire her than her protected speech.[72]

The Idaho Supreme Court erred in holding that "Cheadle's speech does not affect matters of 'public concern.'... The speech is directed at whether Walhof should be dismissed — an office dispute — and is similar to the type of dispute that gave rise to the suit in *Connick.*" *Gardner v. Evans,* 719 P.2d at 1195. That holding ignores the facts of this case. The Commission meeting room was filled and many there felt compelled to speak. Minutes of Feb. 3, 1984, Commission Meeting at R. 217-46. Moreover, the hiring of an executive director is a public matter specifically assigned to the Commission by state law. Idaho Code 67-5405 (1980 & Supp. 1985). The Commission had invited comments on the matter from Cheadle. Cheadle spoke both as a private citizen and as deputy director of the Commission, a member of the community most likely to have informed and definite opinions about whether the agency would lose its effectiveness with the loss of Mrs. Walhof. *See Pickering v. Board of Education,* 391 U.S. 563, 572 (1968). The Idaho

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[71] Contrast, *e.g.,* Barton Dep. 43-45 with Gardner Dep. 9, 16; Barnes Dep. 57 with Ugaki Dep. 9-14; Ugaki Dep. 49 with Peterson Dep. 34.

[72] Ugaki Dep. 58. Barnes Dep. 30. Evans Dep. 18. Minutes of Feb. 3, 1984 meeting of I.C.B., R. 217-46.

Supreme Court gave no reason for its finding that Cheadle's speech was merely an office dispute. Yet it is clear that the directorship of an important state agency is of major public concern, no less than is the governorship of a state or the judgeship of a court. That her responsibilities were narrower than a governor's made Mrs. Walhof's position more important to blind members of the community, rather than less.

The Idaho Supreme Court, quoting from Respondent Barton's deposition, admitted that Cheadle was fired because of his speech.[73] Barton claimed he was afraid Cheadle might not be willing to work with him. Yet, his subjective apprehension that an employee might not be willing to work with him cannot overcome the importance of Cheadle's speech. The thrust of Cheadle's speech was his unlimited support and admiration for Walhof, to the extent that he was willing to put his own neck on the line to demonstrate the depth of his dedication, not his refusal to work under Barton. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982) ("An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech.") Nor can Cheadle's speech be characterized as insubordination, as was Myers' speech in *Connick,* on which the Idaho Supreme Court relied, because Cheadle was at the time subordinate to Walhof, not to Barton.

## III The Supreme Court Of Idaho Erred In Refusing To Grant Constitutional Protection To Membership In The National Federation Of The Blind.

The Idaho Supreme Court blatantly ignored this Court's continuing insistance that "whether the beliefs sought to be advanced by association pertain to political, economic, religious, or cultural matters, ... state action which may have the effect of

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[73] *Gardner v. Evans,* 719 P.2d 1185, 1195 (Idaho 1986).

curtailing the freedom to associate is subject to the strictest scrutiny." *N.A.A.C.P. v. Alabama,* 357 U.S. 449, 460-61 (1958). The Supreme Court of Idaho failed to apply the strict scrutiny required by this Court.[73-1]

Discrimination directed against petitioners because of their membership in the N.F.B. will discourage persons in Idaho and other states from continuing membership in or joining the N.F.B. The record clearly shows respondents' concern that there were "two warring factions" in the Idaho blind community. The N.F.B. and the I.B.I. were identified as representing the two warring factions. Petitioners were all members of the N.F.B. Petitioner Walhof was replaced by an I.B.I. member. Petitioner Gardner has been replaced by an I.B.I. member. The message is clear: those who wish freely to express their beliefs by membership in the N.F.B. will not be tolerated in positions of leadership on the staff of the Idaho Commission for the Blind.

Nor on the facts of this case can the state of Idaho argue the sort of "compelling interest" which might justify violation of petitioners' First Amendment rights. *Bates v. City of Little Rock,* 361 U.S. 517 (1960); *N.A.A.C.P. v. Alabama,* 357 U.S. 449 (1958). Governor Evans insisted that "[n]o national foundation or group should have control over the programs that the Commission for the Blind needs to establish."[74] Evan's Dep. 6. Respondents Barnes, Barton, and Ugaki complained that the N.F.B had too much control over the Commission for the Blind. A claim that their actions are justified by an effort to

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[73-1] The Idaho court erroneously held that members of "The National Federation Of The Blind...are not entitled to any constitutional protection of association so far as their claims are grounded in 'personal liberty' principles." 719 P.2d at 1196 n.3. *Roberts v. United States Jaycees,* 468 U.S. 609 (1984), upon which the Idaho court relied cannot control this case because of the profound differences between a civic or commercial organization such as the Jaycees and a cohesive, ideologically-oriented civil rights organization such as the N.F.B.

[74] Evans Dep. 6. *See also* A. 52.

remove the Commission from the control of one interest group cannot stand in light of the fact that their actions have placed the Commission under the control of the I.B.I. Respondents have penalized membership in the N.F.B. as an alternative philosophy in the blind community of Idaho.

The Idaho Supreme Court erred in holding that there was no evidence that respondents were motivated by animus against the N.F.B. Respondent Evans specifically stated that since Walhof and Cheadle were members of the N.F.B. they were part of the N.F.B.'s attempt to control the Commission, and that that attempt was inappropriate. The I.B.I.'s stated goals included removing N.F.B. members from the Commission, and specifically targeted petitioners for removal because of their membership in N.F.B. Respondent Ugaki, who was good friends with and supported in his confirmation by I.B.I. members, acted pursuant to complaints from those who wanted the N.F.B. out of the Commission. Ugaki said that Petitioner Gardner had not received any of the complaints against Petitioner Walhof, because everyone knew he was N.F.B. and would stand behind Walhof. Respondent Barton, a member of I.B.I., charged that the Commission for the Blind would not listen to other groups because petitioner Gardner was a member of N.F.B. Respondents Barnes and Ugaki effectively excluded Gardner from his position as Chairman of the Board by excluding him from meetings where important Commission business was conducted. Barnes also acted pursuant to complaints from those who wanted the N.F.B. out of the Commission.

Clearly, the goal of respondents was to rid the I.C.B. of N.F.B. members holding supervisory positions. *Cf. Shelton v. Tucker,* 364 U.S. 479, 486-87 (1960). Petitioners, as members of the N.F.B., were the victims of this concerted activity. This Court's emphatic language in *N.A.A.C.P. v. Alabama,* 357 U.S. 449 (1948), condemns such sacrifices:

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. [cites] It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.

357 U.S. at 460. Even should this Court decline to hold that the conspiracy in this case is subject to the remedial provisions of 42 U.S.C. § 1985(3), the acts of the conspirators, including Barton, constitute state action subject to the remedial provisions of 42 U.S.C. § 1983. *Cf. Adickes v. Kress & Co.,* 398 U.S. 144 (1970).

## IV. The Supreme Court Of Idaho Erred In Affirming Summary Judgment Against Gardner And Cheadle On Their Claims Under § 504 Of The Rehabilitation Act Of 1963.

The summary dismissal of petitioners' § 504 claims raises important questions of federal law concerning the applicability of federal regulations promulgated by the United States Department of Education to state agencies which are recipients of federal funds.

Petitioners' § 504 claims also raise an important, unresolved issue of federal remedial law as to which the lower courts need direction. There is substantial authority in the lower courts to support an award of damages under § 504. *See, e.g., Miener v. Missouri,* 673 F.2d 969 (8th Cir. 1982); *Fitzgerald v. Green Valley Area Education Agency,* 589 F. Supp. 1130 (S.D. Iowa 1984); *Christopher v. McDaniel,* 569 F. Supp. 291 (N.D. Ga. 1983); *Nelson v. Thornburgh,* 567 F. Supp. 369 (E.D. Pa. 1983); *Sanders v. Marquette Public Schools,* 561 F. Supp. 1361 (W.D. Mich. 1983); *Hurry v. Jones,* 560 F. Supp. 500 (D.R.I.

1983); *Gelman v. Department of Education,* 544 F. Supp. 651 (D. Colo. 1982); *Patton v. Dumpson,* 498 F. Supp. 933 (S.D.N.Y. 1980); *Poole v. South Plainfield Board of Education,* 490 F. Supp. 948 (D.N.J. 1980). It would be impossible to redress fully any violation of Gardner's § 504 rights without permitting an action at law for damages, since Gardner's term on the I.C.B. has expired.

The Idaho Court held that the evidence "simply fails to suggest that Gardner was precluded participation in the process resulting in Walhof's dismissal, or that Walhof was in fact dismissed solely because of their handicap." *Gardner v. Evans,* 719 P.2d 1185, 1198 (Idaho 1986).

The Idaho Court's dismissal of petitioners' § 504 claims because the federal "Act does not . . . make *any* discharge of a handicapped individual discriminatory *per se,*" 719 P.2d at 1198, misconceives the applicable federal standards. The exclusion of Gardner, a blind person and chairman of the I.C.B., from the "private meetings" of the two sighted members of the Commission with Peterson, Barton and each other clearly constitutes an exclusion of Gardner from "participation in . . . [a] program or activity receiving Federal financial assistance" in violation of 34 C.F.R. § 104.4 (a) (1984). No plausible explanation has been offered by respondents or the Idaho Supreme Court for Gardner's exclusion and on this record a compelling inference arises that Gardner was excluded from the "private meetings" of petitioners in January and February 1984 because of his blindness, philosophy of blindness or affiliation with the N.F.B.

The exclusion of Gardner from petitioners' "private meetings" likewise constitutes a flagrant violation of 34 C.F.R. § 104.4(b)(vi) (1984) which provides that recipient agencies may not deny a qualified handicapped person the opportunity "to participate as a member of planning or advisory boards."

The exclusion of Gardner violates 34 C.F.R. § 104.4(b)(4)(i) and (ii) (1984) because the "private meetings" were an "arrangement" or "method of administration" which had the forbidden effect of subjecting Walhof to discrimination on the basis of handicap and of substantially impairing the objectives of the recipient's program with respect to the employment of blind persons.

The "private meetings" of petitioners are inconsistent with the federal requirement that a recipient "may not limit, segregate or classify employees in any way that adversely affects their opportunities or status because of handicap." 34 C.F.R. § 104(a)(3) (1984).

The Idaho Supreme Court did not address the applicable federal regulations in disposing of petitioners' § 504 claims although petitioners had briefed their reliance on 34 C.F.R. part 104 in the Idaho Supreme Court. Brief of Appellants filed in the Idaho Supreme Court at 97-108. This was error because federal regulations promulgated pursuant to the Rehabilitation Act are "an important source of guidance on the meaning of § 504." *See Alexander v. Choate,* ____ U.S. ____, 105 S.Ct. 712, 722 n.24 (1985). *Accord, Consolidated Rail Corp. v. Darrone,* 465 U.S. 624, 632-36, 634 n.14 (1984); *Southeastern Community College v. Davis,* 442 U.S. 397, 413 (1979). *Cf. Guardians Association v. Civil Service Commission of New York,* 463 U.S. 582 (1983).

The Idaho Supreme Court's suggestion that Walhof was dismissed "because she was perceived as being too aggressive in her handling of personnel matters," 719 P.2d at 1199, falls far wide of its intended mark; the record establishes that Walhof would not have been fired but for her membership in the N.F.B. and her press release of January 5, 1986. The suggestion of the Idaho Supreme Court is not based upon a finding of fact by the district court or the preponderance of the evidence in this case. In the Idaho political context, Walhof was especially subject to

the charge of "aggressiveness" both because of her sex and her blindness.[75]

When she was hired, Walhof was told that there were "personnel problems" at the agency which would require her to "show strength."[76] During her brief tenure, Walhof brought rigor into a relaxed and marginally effective program.[77] The Idaho Supreme Court not only erred in magnifying alleged problems of personnel administration at the Commission. The Idaho Court failed to consider that some of the complaints about Walhof's personnel management were, in fact, based on her blindness and that other complaints were generated by the I.B.I. and those who wanted Walhof fired because of her N.F.B. affiliation.[78]

The Idaho Supreme Court erroneously affirmed summary judgment on Walhof's § 504 claim although under federal law Walhof was entitled to have her claim considered in the context of the "disparate impact" standard established by 34 C.F.R. §

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[75] Barnes Dep. 43.

[76] R. 248.

[77] Gardner Dep. 27.

[78] *See*, e.g., Waters Dep. 6-13. Waters, an accountant who resigned during Walhof's tenure (also an I.B.I. member), objected to the alleged "monitoring" of phone calls, mail and visitors under Walhof's administration. The practices to which Waters objected may, in fact, have reflected her prejudice to the alternative means in which blind persons acquire information about the world of which they are a part. A sighted person would not need someone to "monitor" visitors because she could see them. An important alternative technique in which a blind administrator may learn of the presence of visitors and respond accordingly to their presence is through what Waters described as "monitoring." In Barrett Dep. at Ex. 4, Mrs. Milford objected to the questions Mrs. Walhof asked in a job interview, such as what clothes Milford preferred to wear to work, which way the Mississippi flows, and naming three cities in the west. A blind director of an agency for the blind has a legitimate interest in assessing the perceptions and sartorial preferences of her sighted prospective employees.

104.4(b)(4)(i) and (ii) (1984). The criteria and methods of administration used by the sighted members of the I.C.B. board in discharging Walhof adversely affected the employment of blind persons although the "primary goal of the Act is to increase employment." *Consolidated Rail Corp. v. Darrone,* 465 U.S. at 632 n.13.

## V. The Supreme Court Of Idaho Erred In Affirming Summary Judgment Against Petitioners' Due Process Claims.

This case presents an important unresolved question of federal law on the extent to which this Court's holding in *Cleveland Board of Education v. Loudermill,* ____ U.S. ____, 105 S. Ct. 1487 (1985) applies to state "exempt" employees "who do not enjoy the statutory protection that 'classified employees' enjoy." *Gardner v. Evans,* 719 P.2d at 1196. Although "exempt" employees may not enjoy as much statutory protection as classified civil servants, the Idaho Supreme Court erred in concluding that there are "no statutorily-created property interests to which Walhof and Cheadle can claim entitlement." 719 P.2d at 1177. Walhof and Cheadle were denied property interests they enjoyed as citizens of Idaho that notice must be of a "kind . . . that informs the people of the object and purpose" of a public action. *Sommercamp v. Kelly,* 8 Idaho 712, 71 P. 147, 150 (1902). Cheadle additionally enjoyed a state property interest in an I.C.B. policy that staff not be subject to dismissal without the prior approval of the Idaho Commission. R. 130. The Idaho state law requiring at least one member of the I.C.B. board to be blind likewise conferred a substantial interest on petitioners that employment decisions would not be made—as they were in this case—exclusively by sighted persons. IDAHO CODE ANN. § 67-5403.

The Idaho Supreme Court also erred in concluding that "Walhof and Cheadle can point to no public policy that is contravened by their discharge." 719 P.2d at 1198. Federal public

policy applicable in Idaho under the Supremacy Clause requires that "at will" state employees such as Walhof and Cheadle be protected against dismissal on associational grounds in violation of the First Amendment. *Elrod v. Burns,* 427 U.S. 347 (1976) and *Branti v. Finkel,* 445 U.S. 507 (1980). Although the state is free to define whether employees are "exempt" or "classified" under state law, the rights of state employees against dismissal on associational grounds is a question of federal law. The Governor of a State "may appropriately believe that the official duties of various assistants who help him write speeches, explain his views to the press or communicate with the legislature cannot be performed effectively unless those persons share his political beliefs . . . ." *Branti v. Finkel,* 445 U.S. at 519. Under federal law, neither Walhof nor Cheadle occupied a "policymaking or confidential position." *Branti v. Finkel,* 445 U.S. 507, 519 (1980). At the very least, Walhof and Cheadle were deprived of their right under *Branti* to be immune from discharge on the ground of their N.F.B. affilliation or other political associations.[79]

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[79] R. 158-59.

## CONCLUSION

This is the most important case involving the civil rights of the blind to reach this Court. The case raises compelling questions concerning petitioners' rights of speech and association under the First Amendment. The case also presents substantial claims alleging discrimination against petitioners on the basis of blindness in violation of § 504 of the Rehabilitation Act of 1973. Unfortunately, Idaho state courts proved to be a forum thoroughly unsympathetic to the vindication of petitioners' federal civil rights. The Idaho courts' summary dismissal of petitioners' federal claims is inconsistent with the prior decisions of this Court. Review is essential to preserve petitioners' substantial claims and the supremacy of federal law.

Respectfully submitted,

Frederic S. Le Clercq
Counsel for Petitioners

## CERTIFICATE OF SERVICE

I certify that on this the 11th day of September, 1986 that three copies of this petition for certiorari were served upon the following counsel for respondents at the addresses listed below by placing same in an envelope with sufficient postage and depositing them into the United States mail:

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Clemons, Cosko and Humphrey
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Frederic S. LeClercq
Attorney for Petitioner
By: St. Louis Law Printing Co.

# APPENDIX

## APPENDIX A

IN THE SUPREME COURT OF THE STATE OF IDAHO

NO. 15921

NORMAN GARDNER, Chairman of the Idaho Commission for the Blind, both individually and in his official capacity representing himself and representing the Idaho Commission for the Blind whose home address is 8265 Valley View Drive, Boise, Idaho, 83704, IDAHO COMMISSION FOR THE BLIND, 341 W. Washington, Boise, Idaho, 83702; RAMONA WALHOF, individually and in her capacity as Director of the Idaho Commission for the Blind, 342 West Washington, Boise, Idaho 83702; JOHN A. CHEADLE, individually and in his capacity as Deputy Director of the Idaho Commission for the Blind, 6018 Bay, Boise, Idaho 83704,

*Plaintiffs-Appellants,,*

vs.

JOHN V. EVANS, GOVERNOR of the STATE OF IDAHO, individually and in his capacity as the CHIEF EXECUTIVE of the STATE OF IDAHO

MARTY PETERSON, DIRECTOR, Division of Financial Management Office of the Governor, individually and in his capacity as Director of the Division of Financial Management, LAWRENCE B. BARNES, individuall and in his capacity as a member of the Board of the Idaho Commission for the Blind, 5120 Sorrento Drive, Boise, Idaho, 83704; JACK UGAKI, individually and in his capacity as a Member of the Board of the Idaho Commission for the Blind, 265 Cascase, Idaho Falls, Idaho 83401; and HOWARD H. BARTON, Jr., individually, 2605 Utter, Boise, Idaho 83706,

*Defendants-Respondents.*

**REMITTITUR**

(Filed June 13, 1986)

TO: FOURTH JUDICIAL DISTRICT COURT
COUNTY OF ADA

The Court having announced its Opinion in this cause May 22, 1986, which has now become final; therefore,

IT IS HEREBY ORDERED that the District Court shall forthwith comply with the directive of the Opinion, if any action is required; and

IT IS FURTHER ORDERED that costs in the amount of $144.00 are allowed to Respondents. No attorney fees on appeal.

DATED this 13th day of June, 1986.

Clerk of the Supreme Court
STATE OF IDAHO

ATS-1900 IDAHO SUPREME COURT REGISTER OF ACTIONS AS OF 06/22/86 DE= PAGE 1

DOCKET NO.: 15921 S | DIST: 4 COUNTY: ADA | JUDGE: R. NEWHOUSE | COURT-REPORTER

TYPE: 29 (OTHER CIVIL) | DOCK: 84250 | JUDGMENT: 01/31/85 | CROMWELL, D./TUCKER & ASSOC.

| .NOTICE. | AT-ISSUE-ON..... | HEARING-HELD....TERM | OPINION-FILED....TYPE-OF-OPINION..... | REMITTITUR..... | STATUS-CODE..88 |
|---|---|---|---|---|---|
| 03/08/85 | 11/22/85 (259) | 02/11/86 (340) B | 05/22/86 (440) AFFIRMED | 06/13/86 (462) | REMITTITUR FILED |

**SAT** BISTLINE DONALDSON BAKES HUNTLEY MC FADDEN (RETIREDAUTHOR: BISTLINE

--- FORMAL TITLE --- 32 ENTRIES

NORMAN GARDNER, CHAIRMAN OF THE IDAHO COMMISSION FOR THE BLIND, BOTH INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY REPRESENTING HIMSELF AND REPRESENTING THE IDAHO COMMISSION FOR THE BLIND, WHOSE HOME ADDRESS IS 4265 VALLEY VIEW DRIVE, BOISE, IDAHO, 83704; IDAHO COMMISSION FOR THE BLIND, 341 WEST WASHINGTON, BOISE, IDAHO 83702; RAMONA WALHOF, INDIVIDUALLY AND IN HER CAPACITY AS DIRECTOR OF THE IDAHO COMMISSION FOR THE BLIND, 341 WEST WASHINGTON, BOISE, IDAHO, 83702; JOHN A. CHEADLE, INDIVIDUALLY AND IN HIS CAPACITY AS DEPUTY DIRECTOR OF THE IDAHO COMMISSION FOR THE BLIND, 4018 BAY, BOISE, IDAHO, 83704,

PLAINTIFFS-APPELLANTS,

V.

JOHN V. EVANS, GOVERNOR OF THE STATE OF IDAHO, INDIVIDUALLY, AND IN HIS CAPACITY AS THE CHIEF EXECUTIVE OF THE STATE OF IDAHO; MARTY PETERSON, DIRECTOR, DIVISION OF FINANCIAL MANAGEMENT, OFFICE OF THE GOVERNOR, INDIVIDUALLY AND IN HIS CAPACITY AS DIRECTOR OF THE DIVISION OF FINANCIAL MANAGEMENT; LAWRENCE W. BARNES, INDIVIDUALLY, AND IN HIS CAPACITY AS A MEMBER OF THE BOARD OF THE IDAHO COMMISSION FOR THE BLIND, 5120 SORRENTO DRIVE, BOISE, IDAHO 83704; JACK USAKI, INDIVIDUALLY, AND IN HIS CAPACITY AS A MEMBER OF THE BOARD OF THE IDAHO COMMISSION FOR THE BLIND, 265 CASCADE, IDAHO FALLS, IDAHO, 83401; AND, HOWARD M. BARTON, INDIVIDUALLY, 2605 UTTER, BOISE, IDAHO, 83706,

DEFENDANTS-RESPONDENTS.

----------ATTORNEYS----------

KENNETH MALLEA (GARDNER, ETAL)
MICHAEL SPINK & STANLEY WELSH (BARNES, ETAL)

PATRICK COSTELLO (EVANS)

------- APPELLANT ATTORNEYS -------

* CONTINUED ON NEXT PAGE *

| ..DATE.. | REGISTER-OF-ACTION ..... 97 ENTRIES |
|---|---|
| 03/08/85 | FILED NOTICE OF APPEAL. NC, C & R. |
| 03/08/85 | RECEIVED COPY OF NOTICE OF COUNSEL'S CONSENT TO CLERK MAILING RECORD TO CO-COUNSEL AS FILED IN THE DISTRICT COURT 3-6-85. |
| 03/08/85 | ***SUSPENDED*** POSSIBLE MOTION BY APPELLANT TO SUBMIT C |
| 03/19/85 | TRANS. AS AN EXHIBIT. *PER CALL FROM KAY GREENE ON 3-19-85 RE: MARCH 7, 1985, LETTER TO MR. LE CLERCQ, DISTRICT COURT HAS RECEIVED FULL PAYMENT FOR CLERK'S RECORD. KAL |
| 03/08/85 | ** SPECIAL MAILING - LYNN E. THOMAS, SOLICITOR ** GENERAL, STATEHOUSE MAIL, BOISE, ID 83720. |
| 03/19/85 | FILED MOTION FOR ASSOC. OF FOREIGN COUNSEL C FOR APPELLANT OF MAPC MAURER, SUITE 100, COURT SQUARE BLDG., 200 EAST LEXINGTON ST., BALTIMORE, MARYLAND 21202, AND FREDERIC S. LE CLERCQ, 1505 WEST CUMBERLAND AVE., KNOXVILLE, TENNESSEE 37996, FOR PURPOSES OF THE APPEAL. AFFIDAVIT IN SUPPORT. CM. NC. |
| 03/20/85 | FILED CLERK'S CERTIFICATE. NC, C, R & SM. |
| 03/19/85 | RECEIVED LETTER FROP DISTRICT COURT CLERK THAT ON 3-18-85 SHE RECEIVED PAYMENT FOR THE CLERK'S RECORD. NC & C. |
| 04/01/85 | FILED MOTION BY APP. TO RECEIVE AS AN EXHIBIT C REPORTER'S TRANSCRIPT OF PROCEEDINGS IN THE DISTRICT COURT. CM. NC. |
| 04/01/85 | ***SUSPENDED*** APP. MOT. TO RECEIVE TRANS. AS EXHIBIT C |
| 04/12/85 | FILED AMENDED NOTICE OF APPEAL. NC, C & R. |
| 04/15/85 | ENTERED ORDER GRANTING MOTION FILED 3-19-85. NC. |
| 05/09/85 | ENTERED ORDER DENYING MOTION FILED 4-1-85 RE APPS' MOTION TO RECEIVE TRANSCRIPT AS AN EXHIBIT. NC, J, C & R. |
| 05/09/85 | SET *DUE DATE* - REPORTER'S TRANS. & CLERK'S RECORD DUE 7-11-85 |
| 07/18/85 | FILED REPORTER'S TRANSCRIPT (2 VOLS.). NC & C. |
| 07/18/85 | FILED CLERK'S RECORD (2 VOLS.). |
| 07/18/85 | RECEIVED EXHIBITS ------LARGE BOX------ |
| 07/18/85 | SET *DUE DATE* - APPELLANT'S BRIEF DUE 8-22-85. |
| 08/13/85 | FILED MOTION TO FILE BRIEF IN EXCESS OF 75 PAGES BY C APP. CM. NC. |
| 08/16/85 | ENTERED ORDER GRANTING MOTION FILED 8-13-85. **THE BRIEF SHALL NOT EXCEED 100 PGS. WITHOUT A FURTHER ORDER OF THIS COURT**. NC. *NOTICE SENT* |
| 08/19/85 | FILED MOTION TO FILE BRIEF IN EXCESS OF 100 PAGES BY C APP.-IN EXCESS OF 100 PGS.- CM. NC. |

* CONTINUED ON NEXT PAGE *

BEST AVAILABLE COPY

DOCKET NO.: 15921 ? | DIST: 4 COUNTY: ADA JUDGE: R. NEWHOUSE COURT-REPORTER

TYPE: 29 (OTHER CIVIL) | BOOK: 86250 JUDGMENT: 01/31/85 CROMWELL, D./TUCKER & ASSOC.

| .NOTICE. | AT-ISSUE-ON..... | HEARING-HELD....TERM | OPINION-FILED....TYPE-OF-OPINION..... | REMITTITUR..... | STATUS-CODE..88 |
|---|---|---|---|---|---|
| 03/08/85 | 11/22/85 (259) | 02/11/86 (340) 9 | 05/22/86 (440) AFFIRMED | 06/13/86 (482) | REMITTITUR FILED |

| **SAT** BISTLINE | BONALDSON | BAKES | | *HUNTLEY | MC FADDEN (RETIREDAUTHOR: BISTLINE |
|---|---|---|---|---|---|
| | | | | 08/20/85 | ENTERED ORDER GRANTING MOTION FILED 8-19-85. MC. |
| MALLEA & SCRIVNER | | | | 08/22/85 | FILED APPELLANT'S BRIEF. CM. MC. *NOTICE SENT* |
| 345-1373 | BOISE | ID | 83701 | 08/22/85 | SET *DUE DATE* - RESP. BRIEF DUE 9-19-85. |
| MALLEA, KENNETH L | | | | 09/04/85 | FILED MOTION & AFF. FOR EXTENS. OF TIME TO 10-18-85 TO FILE RESP. BRIEF. CM. |
| 345-1373 | BOISE | ID | 83701 | 09/05/85 | ENTERED ORDER GRANTING MOTION FILED 9-4-85. MC. *NOTICE SENT* |
| MAURER, MARC | | | | 10/18/85 | FILED RESPONDENT'S BRIEF. (BARNES, ET AL.). CM. MC. |
| (301) 659-9314 | BALTIMORE | MD | 21230 | 10/30/85 | FILED ADDITIONAL AUTHORITIES BY RESPS. CM. MC. |
| LE CLERCQ, FREDERIC S. | | | | 11/22/85 | REC'D LETTER DATED 11-21-85 TO THE CLERK FROM PATRICK COSTELLO W/ATTACHED PREVIOUS LETTER TO THE CLERK WHICH WAS MISDIRECTED. THE BRIEF FILED BY MIKE SPINK WAS ON BEHALF OF ALL RESPONDENTS. MC. |
| (615) 974-1477 | KNOXVILLE | TN | 37996 | | |
| **SPECIAL MAILING** - SEE RA1 | | | 00000 | | |
| ------- RESPONDENT ATTORNEYS ------- | | | | | |
| CLEMONS, COSHO & HUMPHREY | | | | | |
| 344-7811 | BOISE | ID | 83702 | 11/22/85 | FILED LETTER DATED 10-23-85 TO MR. LE CLERCQ FROM MR. COSTELLO, RESP. BRIEF FILED BY MR. SPINK ON 10-18-85 WAS ON BEHALF OF ALL RESPS. (SEE ABOVE ENTRY). MC. |
| SPINK, MICHAEL T. | | | | 11/22/85 | SET AT ISSUE 11-22-85. |
| 344-7811 | BOISE | ID | 83702 | 11/22/85 | SET *DUE DATE* - APP.'S REPLY BRIEF DUE 12-13-85. |
| WELSH, STANLEY W | | | | 12/03/85 | *NOTE* PER CALL FROM MR. LE CLERCQ - PLEASE CALL HIM COLLECT WHEN CASE IS SET FOR ORAL ARGUMENT. NEW PHONE NO. IS (615) 974-1477. MB. |
| 344-7811 | BOISE | ID | 83702 | | |
| COSTELLO, PATRICK D | | | | 12/05/85 | ENTERED ORDER RETAINING IN SUPREME COURT (S). MC. |
| 343-6485 | BOISE | ID | 83707 | 12/06/85 | FILED LETTER DATED 12-2-85 TO THE CLERK, MR. LYON, FROM FROM MR. LE CLERCQ ADVISING APP. WILL NOT SUBMIT A REPLY BRIEF IN THIS ACTION. MC. |
| | | | | 12/31/85 | ENTERED ORDER SETTING CASE FOR HEARING ON THE MERITS- ON TUESDAY, FEBRUARY 11, 1986, AT 9:00 A.M., COURTROOM SUPREME COURT BUILDING, BOISE, ID. MC. |
| | | | | 12/31/85 | PER CONVERSATION W/MR. LE CLERCQ & MR. LYON THE ORAL ARGUMENT SETTING WAS AGREED UPON PRIOR TO THIS DATE. |
| | | | | 02/11/86 | THE CAUSE WAS ARGUED ON THE MERITS BY FREDERIC S. LE CLERCQ (ARGUED) AND KENNETH L. MALLEA (APPEARED) FOR THE APPELLANT. MICHAEL T. SPINK (ARGUED) AND PATRICK D. COSTELLO (APPEARED) FOR RESPONDENT. |
| | | | | 02/11/86 | ENTERED ORDER- THIS CASE BEING FULLY ARGUED, A WRITTEN OPINION WILL ISSUE IN DUE TIME. |
| | | | | 05/20/86 | *NOTE* BY LETTER RECEIVED 12-11-85 FROM KENNETH MALLEA (ATTACHED TO NOTICE OF COURT ASSIGNMENT) HE WAS NO LONGER WITH THE FIRM OF GIVENS, MC DEVITT, PURSLEY, WEBB & RUSER AND HE IS NOW WITH THE FIRM MALLEA & SCRIVNER. MB. |
| | | | | 05/22/86 | FILED CASE OPINION. MC, J & C. |
| | | | | 05/22/86 | APPEAL DESCRIPTION ** APPEAL FROM THE DISTRICT COURT'S DECISION TO GRANT SUMMARY JUDGMENT AGAINST THE PLAINTIFFS. **AFFIRMED.** |
| | | | | 05/29/86 | FILED "MEMORANDUM" OF COSTS BY RESP. IN THE AMOUNT OF |

* CONTINUED ON NEXT PAGE *



BEST AVAIL

DOCKET NO.: 15921 I | DIST: 4 COUNTY: ADA JUDGE: R. NEWHOUSE COURT-REPORTER

TYPE: 29 (OTHER CIVIL) | DOCK: 84250 JUDGMENT: 01/31/85 CROMWELL, D./TUCKER & ASSOC.

| .NOTICE. | AT-ISSUE-ON..... | HEARING-HELD....TE** | OPINION-FILED....TYPE-OF-OPINION..... | REMITTITUR..... | STATUS-CODE..88 |
|---|---|---|---|---|---|
| 03/08/85 | 11/22/85 (259) | 02/11/86 (340) b | 05/22/86 (440) AFFIRMED | 06/13/86 (402) | REMITTITUR FILED |

**SAT** BISTLINE DONALDSON BAKES HUNTLEY MC FADDEN (RETIRED)AUTHOR: BISTLINE

| | |
|---|---|
| | $144.00. CR. NC. |
| 06/13/86 | FILED REMITTITUR. COSTS ($144.00) TO RESPONDENTS. NO ATTORNEYS FEES. NC. J & C. |
| 06/13/86 | RETURNED EXHIBITS W/REMITTITUR HAND-CARRIED. |
| 06/13/86 | RELEASED TO WEST PUBLISHING & MEAD DATA CENTRAL. |
| 07/14/86 | JUSTICE'S COPY TO LAW LIBRARY. |
| 07/14/86 | LAW CLERK'S COPY TO U. OF I. |

LABLE COPY

SUPREME COURT OF IDAHO

CASE NO. 15921

NORMAN GARDNER, Chairman of the Idaho Commission for the Blind, both individually and in his official capacity representing himself and representing the Idaho Commission for the Blind whose home address is 8265 Valley View Drive, Boise, Idaho, 83704, IDAHO COMMISSION FOR THE BLIND, 341 W. Washington, Boise, Idaho, 83702; RAMONA WALHOF, individually and in her capacity as Director of the Idaho Commission for the Blind, 341 West Washington, Boise, Idaho 83702; JOHN A. CHEADLE, individually and in his capacity as Deputy Director of the Idaho Commission for the Blind, 6018 Bay, Boise, Idaho 83704,

*Plaintiffs-Appellants,*

vs.

JOHN V. EVANS, GOVERNOR of the STATE OF IDAHO, individually and in his capacity as the CHIEF EXECUTIVE of the STATE OF IDAHO

MARTY PETERSON, DIRECTOR, Division of Financial Management Office of the Governor, individually and in his capacity as Director of the Division of Financial Management, LAWRENCE B. BARNES, individually and in his capacity as a member of the Board of the Idaho Commission for the Blind, 5120 Sorrento Drive, Boise, Idaho, 83704; JACK UGAKI, individually and in his capacity as a Member of the Board of the Idaho Commission for the Blind, 265 Cascase, Idaho Falls, Idaho 83401; and HOWARD H. BARTON, Jr., individually, 2605 Utter, Boise, Idaho 83706,

*Defendants-Respondents.*

*May 22, 1986*

*BISTLINE, Justice.*

Ramona Walhof was director of the Idaho Commission for the Blind when she was terminated by a 2-1 vote of that Commission. The members of the Commission at the time of Walhof's firing were Dr. Norman Gardner, Commission Chairman and a co-plaintiff in this suit, Lawrence Barnes, and Jack Ugaki, two of several defendants in this suit.

The plaintiffs — Gardner, Walhof, and John Cheadle, a deputy director of the Idaho Commission for the Blind at the time of his firing — allege that Ugaki and Barnes decided to fire Walhof in a manner violative of Idaho's Open Meetings Law, I.C. § 67-2340 *et seq*. This action, they argue, should be held null and void pursuant to I.C. § 67-2347.

The plaintiffs also allege that Ugaki and Barnes then agreed to hire Howard Barton — another defendant in this case — to replace Walhof. After Barton was hired, he fired Cheadle. The plaintiffs argue that because Barton's hiring was illegal, anything he did while in the capacity of Administrative Director is also null and void.

The plaintiffs subsequently amended their complaint, naming as additional defendants Governor John Evans and Marty Peterson, Director of Idaho's Division of Financial Management, and alleging constitutional violations. They claim that Walhoff and Cheadle were dismissed, and Gardner excluded from meetings by Ugaki and Barnes because of the plaintiffs' affiliations with the National Federation of the Blind. This, they claim, violated their First Amendment rights of freedom of association.

The plaintiffs also allege that the defendants fired Walhof and Cheadle and excluded Gardner because Walhof and Cheadle publically criticized a proposal by Governor Evans to consolidate the Idaho Commission for the Blind with the state's Department of Health and Human Services. Thus, plaintiffs also argue that their First Amendment rights of freedom of speech have been violated.

The plaintiffs argue that each of the above acts occurred while defendants were acting within the course and scope of their employment as state officials. They argue, therefore, that they are entitled to relief for these alleged constitutional violations pursuant to 42 U.S.C. §§ 1983 and 1985. In their amended complaint, plaintiffs also alleged due process violations. On appeal, plaintiffs also argue that their complaint sufficiently supports claims for violation of § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Supp. 1984), and for defamation.

The district court, in two separate decisions, granted defendants' motion for summary judgment. The district court held that no genuine issues of fact exist concerning any of plaintiffs' claims, and held, as a matter of law, that defendants were entitled to judgment. Plaintiffs now appeal to this Court.

The plaintiffs raise the following six issues on appeal: (1) Did the district court err in ruling against plaintiffs on their claims of violations of Idaho's Open Meetings Law? (2) Did the district court err in ruling against plaintiffs on their claims of violations of freedom of speech? (3) Did the district court err in ruling against plaintiffs on their claims of violations of freedom of association? (4) Did the district court err by ruling against plaintiffs on their claims of violations of procedural due process? (5) Have plaintiffs adequately made out claims of violations of § 504 of the Rehabilitation Act of 1973? (6) Have plaintiffs adequately alleged a defamation claim?

## I. STANDARD OF REVIEW

Before addressing these issues, we note the standards upon which summary judgments are to be granted and reviewed on appeal. It is axiomatic that a motion for summary judgment should only be granted when all of the facts contained in all the applicable pleadings, depositions, admissions, and affidavits have been construed most favorably to the nonmoving party, and it is clear that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of

law. *Bailey v. Ness,* 109 Idaho 495, 497, 708 P.2d 900, 902 (1985); I.R.C.P. 56(c). Furthermore, the nonmoving party is to be given the benefit of all favorable inferences which might reasonably be drawn from the evidence. *Doe v. Durtschi,* ____ Idaho ____, 716 P.2d 1238 (1986); *Reis v. Cox,* 104 Idaho 434, 438, 660 P.2d 46, 50 (1983). Motions for summary judgment should be granted with caution. *Bailey, supra,* at 497, 708 P.2d at 902; *Steele v. Nagel,* 89 Idaho 522, 528, 406 P.2d 805, 808 (1965). Finally, when the motion is supported by depositions or affidavits, the adverse party "may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." I.R.C.P. 56(e). The latter requirement, however, does not change the standard of favorable construction, mentioned above, which is applicable to summary judgment motions. *Durtschi, supra,* ____ Idaho at ____, 716 P.2d at 1241; *Central Idaho Agency, Inc. v. Turner,* 92 Idaho 306, 310, 442 P.2d 442, 446 (1968). With those standards in mind, we turn to the issues.

## II. THE DISTRICT COURT ERRED [sic] IN RULING AGAINST THE PLAINTIFFS ON THEIR CLAIMS OF VIOLATIONS OF IDAHO'S OPEN MEETINGS LAW

### *A. Idaho's Open Meetings Law.*

In 1974, the legislature declared that "the formation of public policy is public business and shall not be conducted in secret." 1974 Idaho Sess.Laws, ch. 187, § 1, p. 1492, codified at I.C. § 67-2340. In order to implement this mandate, the legislature has declared that "[a]ll meetings of a governing body of a public agency shall be open to the public and all persons shall be permitted to attend any meeting except as otherwise provided by this act." I.C. § 67-2342(1).

An exception to the requirements of I.C. § 67-2342(1) "otherwise provided by this act" is made for meetings classified as "executive sessions." I.C. § 67-2341(2) defines "executive ses-

sions" as, "any meeting...of a governing body which is closed to any persons for deliberation on certain matters." Such sessions are authorized for several types of matters, including when a governing body wishes to deliberate the dismissal of a public employee working under the supervision of that body. I.C. § 67-2345(1)(b). No executive session may be held, however, "for the purpose of taking any final action or making any final decision." I.C. § 67-2345(3). Where only an executive session is held, notice first must be given "to the members of the governing body, and to the general public, stating the reason and the specific provision of law authorizing the executive session." I.C. § 67-2343. Finally, any action taken at any meeting in violation of Idaho's Open Meetings Act, shall be "null and vild." I.C. § 67-2347.

*B. Applying Idaho's Open Meetings Law to the Facts of this Case.*

The Commission fired Walhof on February 3, 1984, during the course of a public meeting. Walhof contends that insufficient notice of this meeting was given by the Commission. We disagree. The record establishes that notice of the February 3, 1984 meeting was mailed out by *Walhof* and that she did in fact attend this meeting. R., Vol. 1, p. 24. Walhof cannot, therefore, argue prejudice as far as any allegation of improper notice is concerned, because it is clear that *she* was not disadvantaged by any notice deficiency.

Walhof next contends that a genuine issue of material fact exists with respect to *when* she was dismissed. Specifically, Walhof argues that viewing the facts most favorably on her behalf leads to the conclusion that she was fired in advance of the February 3, 1984 meeting, and that this was in violation of I.C. § 67-2340 and 67-2345(3). Accordingly, pursuant to I.C. § 67-2347, Walhof argues that her dismissal is null and void. Furthermore, Cheadle argues that Barton's appointment was premature and, thus, that his dismissal is also null and void.

The facts that Walhof and Cheadle argue create a genuine issue of fact about *when* she was fired and Barton hired, include the following:

1. Dr. Gardner testified that Barton, who was appointed by the Commission to replace Walhof, made an "acceptance" speech before the Commission had even voted on whether to dismiss Walhof.

2. Dr. Gardner next testified that within a few minutes after the February 3, 1984 meeting was over, a locksmith was at the Commission's office changing locks.

3. A press release stating that Walhof had been dismissed was released to the press before the Commission had voted on her dismissal.

4. A letter of dismissal was given to Walhof a very short time after the February 3, 1984 meeting. According to Dr. Gardner, the letter had "legal-type wording," which Barton — the signatory to the letter — could not have written. Furthermore, Dr. Gardner testified, the letter to Walhof made "reference to things that the board had told her ostensibly during the meeting about her being dismissed which the board never told her during that meeting."

5. A similar letter was given to Cheadle, whom Barton dismissed upon being named Director of the Blind Commission.

A close review of each of these alleged facts show that they would be either irrelevant, inadmissibie, or incompetent as evidence and therefore do not create any genuine issue of fact with respect to Walhof's and Cheadle's dismissal.

I.R.C.P. 56(e) requires that "supporting and opposing affidavits shall be made on personal knowledge, *shall set forth facts as would be admissible in evidence,* and shall show affirmatively that *the affiant is competent to testify* to the matters

stated therein." (Emphasis added.) The matters referred to by Gardner, and upon which the plaintiffs rely, do not satisfy either the requirement of admissibility or competency under Rule 56(e). Most are opinions or conclusions of Gardner, which are not only inadmissible, but which are contrary to other admissible evidence in the record. Other evidence relied upon is irrelevant to the issue before us.

Taking the five items up in order, it is readily apparent that Gardner's testimony that Barton made an "acceptance" speech before the Commission even voted on whether to dismiss Walhof is an inadmissible conclusion. It is also contrary to the uncontradicted evidence in the case.

As mentioned above, the February 3, 1984 meeting was properly noticed by Walhof herself, and started at 9:00 in the morning, with the Commission meeting in an executive session. The public portion of the meeting commenced sometime around 10:00. At the very start of the public portion, a motion was made by Commissioner Barnes "that we relieve Mrs. Walhof of her duties as administrator immediately and leave her on administrative pay for 45 days.... I'd like to appoint Howard Barton acting administrator for six months." The motion was seconded by Commissioner Ugaki. There then followed approximately two to three hours of heated discussion between two competing factions, with some fifteen or twenty people debating the pros and cons of the motion.

The meeting adjourned for lunch and reconvened sometime around 2:00 p.m. At that time Howard Barton spoke in an effort to reconcile the two factions supporting and opposing Barnes's motion. A transcript of the meeting shows that he commenced his remarks with the statement, "I think that in the future *if the board does make the decision to retain me as acting administrator for a short period of time* I will make every effort to work with all of the organizations of the blind in this state." (Emphasis added.) He then went on to state what steps he intended to take to try to accomplish that. Thus, it is clear that

not only is Gardner's statement that Barton made an "acceptance" speech before the Commission voted an inadmissible opinion or conclusion of Gardner, it is contrary to the uncontradicted record in the case. Barton only spoke some two to three hours *after* the motion had been made and debated, and then he qualified his remarks with the comment, "if the board does make the decision to retain me." Accordingly, there is no merit to Gardner's first contention that the Commission must have met before and made a decision because Barton had made an "acceptance" speech before the Commission even voted on whether to dismiss Walhof.

Regarding the locksmith's presence, the testimony shows that the locksmith arrived several minutes after the meeting concluded. We do not see how this evidence is substantial and competent proof that Barnes and Ugaki met before the meeting and had an agreement to discharge Walhof. It therefore fails to create any genuine issue of material fact, and we so hold.

The plaintiffs' third contention — that a press release stating that Walhof had been dismissed was handed to the press before the Commission had voted on her dismissal — is irrelevant with respect to the issue before us. It is not shown that it was prepared by anyone connected with the Blind Commission or the defendants in this action. Rather, the record shows that the press release was prepared by a Brian Wardle, who was president of the Idependent Blind of Idaho, and a supporter of the defendants' decision to fire Walhof. In two separate depositions, Wardle testified that he wrote the press release during the noon hour from notes he made while at the morning session as the various people testified. He also testified that he did hand a copy to a member of the press before the Commission's vote. The individual read it and said, "This hasn't happened yet," to which Wardle said, "You're right. I'll give it to you after the meeting, if it happens." Wardle then testified that the person "gave it back to me, and I handed it out to the press corps after that was over." Thus, it is clear from the record that the press

release emanated from the Independent Blind of Idaho, and is not attributable to the Commission or the defendants. It falls short of being relevant to fixing the time when the decision was made to fire Walhof.

The next contention which Gardner made in his deposition is that the letter of dismissal given to Walhof a very short time after the meeting terminated had "legal type wording," which Gardner opined Barton was incapable of composing. Accordingly, it was his conclusion that it must have been drawn by a lawyer beforehand. This mere conjecture and opinion, without any foundation laid, would not be admissible evidence. Accordingly, under Rule 56(e) the trial court properly disregarded it, as must this Court.

The last contention is that a letter of dismissal given to Cheadle whom Barton dismissed after he took over also could not have been written by Barton. For the same reasons stated above, it is clear that this allegation is equally inadmissible as pure conjecture and a conclusion of the witness. Accordingly, we hold that the facts do not create a genuine issue of material fact. We therefore affirm the district court on this issue.

## III. THE DISTRICT COURT DID NOT ERR IN RULING AGAINST PLAINTIFFS ON THEIR CLAIMS OF VIOLATIONS OF FREEDOM OF SPEECH

### *A. Introduction.*

On this issue, Walhof alleges that Commissioners Ugaki and Barnes fired her because of criticism she leveled at Governor Evans' proposal to merge the presently independent Idaho Commission for the Blind with the Department of Health and Human Services. Walhof further alleges that the two commissioners decided to dismiss her because of pressure they received from Governor Evans and Martin Peterson. This, Walhof argues, violated her First Amendment rights of free speech.

Cheadle argues that Barton fired him because of a speech Cheadle delivered at the February 3, 1984 meeting wherein Cheadle vigorously defended Walhof's record. This, Cheadle argues, violated his First Amendment rights of free speech. Based upon applicable law and the facts of this case, the arguments of both Walhof and Cheadle are not persuasive.

*B. The Applicable Law.*

Neither Walhof nor Cheadle have alleged that the *Idaho* Constitution's provision for freedom of speech — art. 1, § 9 — has been violated. "[B]ecause the wording of that section is different from that found in the First Amendment," *State v. Newman,* 108 Idaho 5, 15 n. 25, 696 P.2d 856, 866 n.25 (1985), we "decline to decide if the rules we apply today under the First Amendment are equally applicable under art. 1, § 9." *Id.* at 16 n. 25, 696 P.2d at 867 n. 25.[1] We therefore turn to case law under the First Amendment.

The most recent decision of the United States Supreme Court to address the First Amendment rights of public employees is *Connick v. Myers,* 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). In *Connick,* the plaintiff-employee, Sheila Myers, was an assistant district attorney. The defendant-district attorney, Harry Connick, proposed to transfer her and alter her duties. Myers objected strenuously and shortly thereafter prepared and distributed a questionnaire to other assistant district attorneys. The questionnaire asked the attorneys their

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[1] Not before us, therefore, is the "task of determining if the First Amendment of the United States Constitution and art. 1, § 9 of the Idaho Constitution compel different analytical methodoligies with outcomes necessarily different in some cases." *Id.* We do note, however, that "[p]referably, when addressing constitutional issues, our state constitutional provisions should be reviewed first before turning to the federal constitution." *Nampa Christian Schools v. Department of Employment,* ____ Idaho ____, ____ n. 3, 719 P.2d 1178, 1196 n. 3 (Sup.Ct. 1986) (citation omitted).

feelings concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervising attorneys, and whether employees felt pressured to work in political campaigns. Connick then discharged Myers for refusing to accept the transfer, stating also that her questionnaire was considered to be an act of insubordination. Connick filed suit under 42 U.S.C. § 1983 (1976 ed., supp. IV), contending that her employment was wrongfully terminated because she had exercised her constitutionally protected right of free speech. *Connick, supra,* 461 U.S. at 141, 103 S.Ct. at 1686-87. A federal district court agreed with Myers, ordering her reinstatement, and awarding her damages, backpay, and attorney's fees. *See Myers v. Connick,* 507 F.Supp. 752 (E.D.La. 1981). The Fifth Circuit Court of Appeals affirmed the district court. *See Myers v. Connick,* 654 F.2d 719 (1981). The United States Supreme Court reversed.

The Supreme Court began its analysis by noting that a state cannot establish conditions of public employment which infringe upon an employee's constitutional right of free speech. *Connick, supra,* 461 U.S. at 142, 103 S.Ct. at 1687; *see also Branti v. Finkel,* 445 U.S. 507, 515-16, 100 S.Ct. 1287, 1293, 63 L.Ed.2d 574 (1980). The Court noted, however, that First Amendment rights in this area are not absolute, and that a court in these circumstances must " 'balance...the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' " *Connick, supra,* 461 U.S. at 142, 103 S.Ct. at 1687, *quoting Pickering v. Board of Education,* 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968).

The Court noted that, while speech on public issues is the quintessential First Amendment value, *Connick, supra,* 461 U.S. at 145, 103 S.Ct. at 1689, the First Amendment "does not require a public office to be run as a round table for employee complaints over internal office affairs." *Id.* at 149, 103 S.Ct. at

1691. Furthermore, government does have a legitimate interest in "effective and efficient fulfillment of its responsibilities to the public." *Id.* at 150, 103 S.Ct. at 1692. The key, then, is in the *nature* of the employee's expression — whether it relates to matters involving "political, social, or other concern to the community," *id.* at 146, 103 S.Ct. at 1690, or to internal office affairs.

The Court stated that Myers' questionnaire, with one exception, could not qualify as a matter of "public concern." *Id.* at 148, 103 S.Ct. at 1690.[2] Overall, the Court viewed Myers' questionnaire as touching upon "matters of public concern in only a most limited sense...." *Id.* at 154, 203 S.Ct. at 1693-94. Accordingly, her First Amendment rights were viewed as being but "limited," *id.* at 154, 103 S.Ct. at 1694, and insufficient to overcome the government's interest in office management. *Id.* Accordingly, the Court ruled against Myers.

Although unmentioned in *Connick,* it is also the law that before the parties' competing interests are weighed in the balancing process discussed above, there is a burden upon the employee to show that the speech in issue was a "substantial" or "motivating factor" in the employee's discharge. *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977). We turn now to the question of whether Walhof met her burden, and then to whether Cheadle has made out a claim for violation of his rights of free speech.

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[2] The one exception was a question which asked whether any assistant district attorney had felt "pressured to work in political campaigns on behalf of office supported candidates." *Id.* at 149, 103 S.Ct. at 1691. This question, the Court stated, did touch on matters of public concern. *Id.* Nevertheless, as discussed above, in balancing the competing interests of this case, Myers' First Amendment rights were not viewed to be as weighty as the government's interests in office management. *Id.* at 154, 103 S.Ct. at 1694.

C. *Walhof Has Failed Her Burden of Proving that the Comments She Made in Criticizing the Governor's Proposed Reorganization of the Blind Commission Were a Substantial Factor in Her Discharge.*

In depositions, Governor Evans, Barnes, Ugaki and Peterson stated that the Governor and his office never sought the dismissal of Walhof, and that the commissioners did not fire her because of her statements. In fact, both Ugaki and Barnes supported Walhof in her opposition to the Governor's proposed plans for the Blind Commission. *See* R., Vol. 3, pp. 115 and 128. Peterson did relay to Barnes and Ugaki information that the Governor wanted an apology from Walhof for allegedly misrepresenting the Governor's position. Barnes stated, however, that the Governor's office only wanted an apology and that they in no way wanted to be part of any request for resignation or discharge. Barnes' Deposition, pp. 63-64, 86-87.

There is nothing in the record to suggest that the Governor's office ordered or was responsible for Walhof's discharge. Neither is there evidence that Commissioners Barnes and Ugaki fired her because of the comments she made which were critical of the Governor. Mere allegations do not suffice in the face of the defendants' depositions. I.R.C.P. 56(e). We find no factual dispute relative to Walhof's dismissal so far as it relates to any infringement of her free speech rights under the First Amendment.

We also note that Barnes voted to dismiss Walhof because she had offended too many people in her management of the Blind Commission and that too many talented people had quit their jobs within the Commission while Walhof had been director. Barnes' Deposition, pp. 43-53. Ugaki agreed with this assessment. *See* Ugaki's Deposition, pp. 58-59. These reasons, quite obviously, violate no constitutional rights and constitute a valid basis upon which the Commission could have acted.

This point is important, because in *Mt. Healthy, supra,* a unanimous Supreme Court declared that even if constitutionality protected conduct *was* a substantial factor in a discharge, the discharge would *not* be held invalid if the governing body can show by a preponderance of evidence that "it would have reached the same decision ... even in the absence of the protected conduct." *Mt. Healthy, supra,* 429 U.S. at 287, 97 S.Ct. at 576. That burden would be met here even if Walhof could prove that what she said was a substantial factor in her discharge. Accordingly, we reject Walhof's arguments on this issue.

D. *Cheadle Has Failed to Establish that His Free Speech Rights Were Violated.*

Cheadle's claim on this issue is against Barton, whom Commissioners Barnes and Ugaki appointed to replace Walhof. Cheadle's allegation is that a speech he made at the February 3, 1984 meeting was a substantial factor in his subsequent discharge. The speech Cheadle refers to was a speech of praise on behalf of Walhof and her accomplishments. Cheadle spoke strenuously for her continued employment and ended by stating that "If Mrs. Walhof goes I will go...." R., Vol. 4, p. 221.

In his deposition, Barton suggested that Cheadle's statement at the February 3, 1984 meeting was at least a substantial factor in his decision to dismiss Cheadle:

> Q. Now, on Friday, the 3rd of February, you took action to dismiss Mr. Cheadle; is that correct?
>
> A. That's correct.
>
> Q. And what was the basis for that action?
>
> A. Well, you would have had to have been in the meeting that took place, I guess, the 3rd, to understand some of the thinking behind that, but it seemed clear to me with respect to what Mr. Cheadle said during that meeting that he would be unwilling to cooperate with me, and I just

> felt that that's what I sensed at that point, and I felt it would be difficult to work with him. So he had said that he would resign, made that quite clear during the meeting. I think there were a number of other people made the same statement. I asked him following the meeting if that's what he fully intended to do and he told me that it was and he told me that he had gone to prepare a letter of resignation in his office. And I said, "If you are going to do that, well then let's get it done."
>
> And then I think later in the afternoon he talked to Mrs. Walhof and then went back to his office and called me and told me no, he was not going to resign, that he felt that he could stay there and do things for the agency. And I told him—well, my feeling at that point, you know, whether anybody wants to criticize it or not, was that I would dismiss you and I did. Barton Deposition, pp. 32-33.

With Barton's testimony, Cheadle has satisfied the *Mt. Healthy* burden of showing that the speech in issue was a substantial factor in his discharge. We turn, then, to the balancing test set forth in *Connick* to determine if his free speech rights have been violated.

Our review of the evidence convinces us that Cheadle's speech does not affect matters of "public concern." *Connick, supra,* 461 U.S. at 148, 103 S.Ct. at 1690. The speech is directed at whether Walhof should be dismissed—an office dispute—and is similar to the type of dispute that gave rise to the suit in *Connick*. The speech cannot be fairly viewed as involving matters of "public concern." So viewed, we feel compelled by the Supreme Court's holding in *Connick* to hold similarily here that Cheadle's free speech rights are not as weighty as the right of the government to govern. Accordingly, we reject Cheadle's free speech claim.

## IV. THE DISTRICT COURT DID NOT ERR IN RULING AGAINST THE PLAINTIFFS ON THEIR CLAIMS OF VIOLATIONS OF FREEDOM OF ASSOCIATION

The plaintiffs' contention on this issue is that Walhof and Cheadle were discharged because of their affiliation with the National Federation of the Blind. Gardner is also a member of this federation, and argues that he was excluded from consultations based upon his membership in the federation.

The right to associate for expressive purposes, although recognized under and protected by the First Amendment, is not absolute. *Roberts v. United States Jaycees,* 468 U.S. 609, 104 S.Ct. 3244, 3252, 82 L.Ed.2d 462 (1984). When action potentially infringes upon this right, a balancing test must be used to weigh the competing interests. *Id.* We hold that the principles and balancing test we discussed in Part III, *supra,* relative to the plaintiffs' free speech claims, are equally applicable here. We similarly hold that the *Mt. Healthy* burden also applies here, requiring plaintiffs to show that their protected association rights were a substantial or motivating factor in their discharge. For the reasons stated below, we hold that they have failed to meet that burden.

The evidence shows that there was much "dissension," Ugaki Deposition, p. 14, within the blind community. Barnes stated in his deposition that two "factions" within the blind community were at "war" with each other. Barnes Deposition, p. 52. These two factions consisted primarily of members of the National Federation of the Blind and members of the Independent Blind of Idaho, of which Barton was a member. The evidence does not show, however, that Walhof and Cheadle were dismissed *because* of their membership in the National Federation of the Blind.

In over 36 pages of their brief, plaintiffs have attempted to demonstrate that they were discharged because of their membership in the National Federation of the Blind. None of the evidence relied upon, however, suggests a plan or decision to

dismiss Walhof and Cheadle *because of* their particular membership. That animosity between the two groups existed is not disputed. The mere showing of animosity, however, cannot survive the instant motion for summary judgment, because that animosity has not been shown to be the *cause* of the dismissals.

We are cognizant of, and readily acknowledge, the right an individual enjoys under the First Amendment "to associate with others in pursuit of a wide variety of political, social, economic, educational, religious and cultural ends." *Roberts, supra,* 104 S.Ct. at 3252. Government actions that unconstitutionally infringe upon this right include: (1) imposition of penalties or the withholding of benefits from individuals because of their membership in a disfavored group, *Healy v. James,* 408 U.S. 169, 180-84, 92 S.Ct. 2338, 2348, 2345-47, 33 L.Ed.2d 266 (1972); (2) required disclosure of membership lists of a group seeking anonymity, *Brown v. Socialist Workers '74 Campaign Committee,* 459 U.S. 87, 91-92, 103 S.Ct. 416, 419-21, 74 L.Ed.2d 250 (1982); and (3) intentional interference with an internal organization's operations, *Cousins v. Wigoda,* 419 U.S. 477, 487-88, 95 S.Ct. 541, 547, 42 L.Ed.2d 595 (1975).[3] Plain-

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[3] As the Supreme Court noted in *Roberts,* not only does an individual enjoy the right of "expressive association," *Roberts, supra,* 104 S.Ct. at 3250, which is grounded in the First Amendment, *id.* at 3249, he or she also enjoys a right of "intimate association." *Id.* at 3250.

This second right is grounded in priciples of "personal liberty," *id.* at 3249, and applies to cases where relationships centering around family, marriage, and children are involved. *Id.* at 3250. The right of "intimate association," by its nature, is only applicable to relationships that are small, intimate, and private. *Id.*

Thus, the Supreme Court has held that the United States Jaycees organization does not possess the types of relationships that are "worthy of this kind of constitutional protection." *Id.* at 3251. This is because of the Jaycees' large size and lack of selectiveness. *Id.* These same reasons lead us to conclude that the plaintiffs, as part of the National Federation of the Blind, are not entitled to any constitutional protection of association so far as their claims are grounded in "personal liberty" principles.

tiffs have not shown how their rights have been violated in this instance. We therefore reject their claims on this issue.

## V. THE DISTRICT COURT DID NOT ERR IN RULING AGAINST PLAINTIFFS ON THEIR CLAIMS OF VIOLATIONS OF PROCEDURAL DUE PROCESS

Walhof and Cheadle argue that they were discharged without procedural due process.[4] They rely upon the case of *Cleveland Board of Education v. Loudermill,* ____ U.S. ____, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), for support. We find *Loudermill* to be inapposite.

In *Loudermill,* an Ohio employee was discharged upon discovery that he had filled out a job application falsely. Ohio law labeled the employee's job position as "classified civil servant." *Id.* 105 S.Ct. at 1490. Under Ohio law, such employees can only be terminated for cause. *Id.* The issue the Supreme Court addressed, therefore, was what "pretermination process must be accorded a public employee who can be discharged only for cause." *Id.* at 1489. The Supreme Court held that federal procedural due process entitled the employee the opportunity to respond to the charges against him *prior to* his removal. *Id.* at 1494-96.

*Loudermill* is inapplicable, however, because it involved the constitutional rights of a "classified civil servant." *Id.* at 1490. In our case, both Walhof and Cheadle qualified as "exempt" employees. I.C. § 67-5303. "Exempt" employees in Idaho do not enjoy the statutory protection that "classified employees" enjoy, I.C. § 67-5302(4), and which are similar to the rights en-

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[4] As with their other constitutional challenges, plaintiffs did not allege any violation of due process under Idaho's Constitution.

joyed by Ohio's classified civil servants.[5] It is clear, then, that the "property interests in continued employment that the employee in *Loudermill* enjoyed, and which classified employees in Idaho enjoy, are not enjoyed by exempt employees in Idaho.

It is the rule that "[p]roperty interests are not created by the Constitution." *Loudermill, supra,* 105 S.Ct. at 1491. Rather, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law...." *Board of Regents v. Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). Thus, the Supreme Court in *Connick* could state: "[O]rdinary dismissals from government service which violate no fixed tenure of applicable statute or regulation are not subject to judicial review

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[5] I.C. § 67-5309(n) sets forth in detail the only grounds upon which a classified employee of the State of Idaho may be discharged. The section is of similar scope to Ohio's law—Ohio Rev.Code Ann. § 124.34 (1984)—which the Supreme Court, in *Loudermill,* held was sufficient to grant the Ohio state employee a right to a pretermination hearing. Section 67-5309(n) states that the state Personnel Commission shall have authority to promulgate:

> (n) A rule for the discharge or reduction of rank or grade or disciplining of permanent employees only *for cause* with reasons given in writing. (Emphasis added.)

Subsection n then proceeds to list seventeen reasons which "shall be proper cause for discharge...." These seventeen reasons include incompetency, insubordination, and other causes relating to job performance and personal honesty. Pursuant to § 76-5309(n), the Personnel Commission has enacted Rule 19.A.1, which incorporates that which is set forth in subsection (n).

I.C. § 67-5309A(2) supplements § 67-5309(n), stating that no "disciplinary dismissal, suspension or demotion ... shall be effective until the affected employee shall have had the opportunity to complete the grievance procedure adopted pursuant to subsection )1) hereof...." The Personnel Commission's corollary rule is Rule 20.A. This section, and the Commission's rule, thus grant a pretermination hearing, and would seem to satisfy the requirements of *Loudermill.*

even if the reasons for the dismissal are alleged to be mistaken or unreasonable." *Connick, supra,* 461 U.S. at 146-47, 103 S.Ct. at 1690.

There are no statutorily-created property interests to which Walhof and Cheadle can claim entitlement. There is also no other principle in our law that would grant the plaintiffs a property interest which would entitle them to due process protection.

In *Harkness v. City of Burley,* ____ Idaho ____, ____, 715 P.2d 1285, 1286-87 (Sup.Ct. (1986), this Court analyzed the question of what would constitute a property interest in employment in Idaho. Said the Court:

> To have a property interest in employment in Idaho, the employee must have more than a mere hope of continued employment. *Loebeck v. Idaho State Board of Education,* 96 Idaho 459, 461, 530 P.2d 1149, 1151 (1975). Certainly a permanent employee, whose employment is not terminable at the will of either the employee or the employer, holds a property interest in his or her position. *Allen v. Lewis-Clark State College,* 105 Idaho 447, 460 n. 6, 670 P.2d 854, 867 n. 6 (1983) ("A term of employment set by contract is a property interest safeguarded by due process."); *Bowler v. Board of Trustees,* 101 Idaho 537, 541, 617 P.2d 841, 845 (1980) (Teacher's interest in renewable contract rights to continued employment was a property interest.); *Ferguson v. Board of Trustees,* 98 Idaho 359, 364, 564 P.2d 971, 976 (1977), *cert. denied,* 434 U.S. 939 [98 S.Ct. 431, 54 L.Ed.2d 299] (Teacher's right to automatic annual renewal of contract and right not to be discharged except for cause gave property interest in employment.).
>
> As Chief Justice Donaldson wrote for a unanimous Court, an employee "hired pursuant to a contract which specified the duration of the employment, *or* limits the reasons for which the employee may be discharged" is not

an employee "at will." [6] *MacNeil v. Minidoka Memorial Hospital,* 108 Idaho 588, 589, 701 P.2d 208, 209 (1985) (emphasis added). The contract can be express or implied. *Clements v. Jungert,* 90 Idaho 143, 153, 408 P.2d 810, 815 (1965); *see Bishop,* [*v. Wood*], *supra,* 426 U.S. [341] at 344 [96 S.Ct. 2074, 2077, 48 L.Ed.2d 684 (1976)]. An employee's handbook can constitute an element of the contract. *Johnson v. Allied Stores Corp.,* 106 Idaho 363, 368, 679 P.2d 640, 645 (1984) (The trier of fact must determine whether "a contract existed between the parties by virtue of the 1962 policy manual...."); *Jackson v. Minidoka Irrigation District,* 98 Idaho 330, 334, 563 P.2d 54, 58 (1977) (This Court enforces the right to a pre-termination hearing, since "a hearing is provided as a matter of contract (the handbook).")....

... Chief Justice Donaldson made it abundantly plain that an employee who by contract could be discharged only for limited reasons, in addition to one with a term of employment, was not an "at will" employee. *MacNeil, supra,* 108 Idaho at 589, 701 P.2d at 209; *see also Hayward v. Henderson,* 623 F.2d 596, 597 (9th Cir.1980) *quoting Maloney v. Sheehan,* 453 F.Supp. 1131, 1142 (D.Conn.1978) ("A law establishes a property interest in employment if it restricts the grounds on which an employee may be discharged. For example, if discharge can only be for 'just cause,' an employee has a right to continued employment until there is just cause to dismiss him. See, *Arnett v. Kennedy,* 416 U.S. 134, 151-52, 94 S.Ct. 1633, 1642-43, 40 L.Ed.2d 15 (1974)."). *Harkness, supra,* ____ Idaho ____, ____, 715 P.2d 1283-87.

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[6] "An exception to the rule that an employee 'at will' may be discharged at any time is 'when the motivation for discharge contravenes public policy.' *MacNeil, supra,* 108 Idaho at 589, 701 P.2d at 209." *Harkness, supra,* ____ Idaho ____ n.1, 715 P.2d 1286 n. 1.

Applying *Harkness* to the facts of this case shows that Walhof and Cheadle were "at will" employees. They can point to nothing which suggests that they had anything more than a "mere hope of continued employment." *Id.*, ____ Idaho ____, 715 P.2d 1286. We find no evidence of any contract or other agreement which limited in any way the grounds upon which they might be discharged. Furthermore, Walhof and Cheadle can point to no public policy that is contravened by their discharge. Hence, because there is nothing in state law which creates any property interest on behalf of the plaintiffs—which necessarily renders the holding in *Loudermill* inapplicable—we hold that they have not been denied procedural due process under the facts of this case.

## VI. PLAINTIFFS HAVE NOT ADEQUATELY MADE OUT CLAIMS OF VIOLATIONS OF § 504 OF THE REHABILIATION ACT OF 1973

The plaintiffs claim (1) that the three counts of their amended complaint, which allege violations of Idaho's Open Meetings Law, the First Amendment, and due process, also support claims under § 504 of the Rehabilitation Act of 1973, found at 29 U.S.C. § 794 (Supp.1984); (2) that the defendants have impliedly consented to consideration of this issue; and (3) that they are entitled to relief under the Act. Without deciding their first two arguments, we rule against them on their third claim, and hold that plaintiffs have failed to state a *prima facie* case under the Act.

In order to state a claim of relief based on a violation of § 504, a plaintiff must prove: (1) that he or she is handicapped; (2) that he or she is otherwise qualified for the position sought; (3) that he or she has been discriminated against solely by reason of the handicap; and (4) that the position exists as part of a program or activity receiving federal financial assistance. *Doe v. New York University,* 666 F.2d 761, 774-75 (2d Cir.1981); *see also Prewitt v. United States Postal Service,* 662 F.2d 292, 306

(5th Cir.1981); *Guerriero v. Schultz,* 557 F.Supp. 511, 513 (D.D.C. 1983).

The purpose of the Rehabilitation Act of 1973 is to "provide assistance to the whole population of handicapped persons" in the United States. *Shirey v. Devine,* 670 F.2d 1188, 1193 (D.C.Cir.1982). Among other things, the Act prohibits discrimination against "otherwise qualified handicapped individual[s]" in federally funded programs. 29 U.S.C. § 794. The Act goes a long way toward rectifying serious wrongs which exist with respect to the opportunity handicapped individuals have had in participating in federally sponsored programs. The Act does not, however, make *any* discharge of a handicapped individual discriminatory *per se.* It is for this reason that plaintiffs alleging wrongs under the Act must satisfy the four requirements mentioned above.

Turning to those requirements, we hold that neither Gardner nor Walhof have created a factual issue with respect to the third requirement. The evidence simply fails to suggest that Gardner was precluded participation in the process resulting in Walhof's dismissal, or that Walhof was in fact dismissed, *solely* because of their handicap.[7]

Walhof argues that I.C. § 67-5409, which states that "preference shall be given to qualified blind persons in filling the position of executive director of the [blind] commission," creates a "rebuttable presumption of discrimination," Appellant's Brief, p. 106, in her discharge. Whether that be true or not we need not decide, because we hold that the *mere* hiring of a sighted individual (Barton) to replace Walhof does not satisfy the requirement set forth above that the handicapped person show that "he or she has been discriminated against *solely* by

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[7] Because plaintiffs have failed to make out a *prima facie* case under the Act with respect to the third requirement, we need not decide whether the fourth requirement has also been satisfied.

reasons of the handicap." *Ante,* p. 1198 (emphasis added). This is especially true when we consider the depositions of the various parties, which we have discussed above, and which state that Walhof was not excluded because she is blind, but because she was perceived as being too aggressive in her handling of personnel matters. We therefore reject plaintiffs' claims on this issue.

## VII. PLAINTIFFS HAVE FAILED TO ADEQUATELY ALLEGE A DEFAMATION CLAIM

In their brief, appellants raise for the first time a defamation claim against Governor Evans and Peterson. We hold that they are precluded from doing so. No such claim was ever pled by the appellants, and no such claim was ever argued before or decided by the district court.

It has been the rule in Idaho that "issues considered on summary judgment are those raised by the pleadings." *Argyle v. Slemaker,* 107 Idaho 668, 669, 691 P.2d 1283, 1284 (Ct.App.1984); *see also First Security Bank of Idaho, N.A. v. Absco Warehouse, Inc.,* 104 Idaho 853, 855, 664 P.2d 281, 283 (Ct.App.1983). The facts of this case show that the issue of defamation has in no way been raised by the pleadings; there is nothing within the pleadings which can fairly be viewed as adequately giving notice of the claim. We accordingly decline to rule on this claim at this late date.

For the foregoing reasons, we affirm the district court. Costs to respondents; no attorney's fees.

DONALDSON, C.J., BAKES and HUNTLEY, JJ., and McFADDEN, J. pro tem, concur.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CASE NO. 84250

NORMAN GARDNER, Chairman of the Idaho Commission for the Blind, both individually and in his official capacity representing himself and representing the Idaho Commission for the Blind whose home address is 8265 Valley View Drive, Boise, Idaho, 83704, IDAHO COMMISSION FOR THE BLIND, 341 W. Washington, Boise, Idaho, 83702; RAMONA WALHOF, individually and in her capacity as Director of the Idaho Commission for the Blind, 342 West Washington, Boise, Idaho 83702; JOHN A. CHEADLE, individually and in his capacity as Deputy Director of the Idaho Commission for the Blind, 6018 Bay, Boise, Idaho 83704,

*Plaintiffs,*

vs.

JOHN V. EVANS, GOVERNOR of the STATE OF IDAHO, individually and in his capacity as the CHIEF EXECUTIVE of the STATE OF IDAHO

MARTY PETERSON, DIRECTOR, Division of Financial-Management Office of the Governor, individually and in his capacity as Director of the Division of Financial Management, LAWRENCE B. BARNES, individuall and in his capacity as a member of the Board of the Idaho Commission for the Blind, 5120 Sorrento Drive, Boise, Idaho, 83704; JACK UGAKI, individually and in his capacity as a Member of the Board of the Idaho Commission for the Blind, 265 Cascase, Idaho Falls, Idaho 83401; and HOWARD H. BARTON, Jr., individually, 2605 Utter, Boise, Idaho 83706,

*Defendants.*

**JUDGMENT**
(Filed January 31, 1985)

THIS MATTER is before the Court on Plaintiffs' Amended Complaint for Declaratory and Injunctive Relief. On February 27, 1984, Defendants filed a Motion for Summary Judgment. Hearing was held on that motion on March 12, 1984. Thereafter, the Court gave the parties extensive opportunities for discovery and allowed additional affidavits and legal briefing to be submitted. On August 31, 1984, the Court entered its Memorandum Decision and Order granting Summary Judgment to Defendants on all issues except the issue of whether the new executive director, Howard Barton, Jr., had the authority to dismiss Plaintiff John Cheadle from his employment at the Idaho Commission for the Blind.

On September 28, 1984, Defendants filed a second Motion for Summary Judgment on the remaining issue of Mr. Cheadle's dismissal. Plaintiffs then filed a Counter-Motion for Summary Judgment. Hearing was held on the competing Motions for Summary Judgment on December 6, 1984. On January 18, 1985, this Court issued a Second Memorandum Decision and Order granting Defendants' second Motion for Summary Judgment, and denying the motion of the Plaintiff.

The Court having made exhaustive review of the substantial record in this matter, and having considered the affidavits and oral and written arguments of counsel, and good cause appearing therefore;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That there are no material questions of fact with respect to the issues raised by Plaintiffs in the Amended Complaint for Declaratory and Injunctive Relief.

2. That, as a matter of law, the Defendants are entitled to Judgment on all issues, and said Judgment is hereby entered.

3. This Judgment incorporates by reference the findings and conclusions contained in this Court's Memorandum Decision and Order of August 31, 1984, and its Memorandum Decision and Order of January 18, 1985.

4. Defendants are entitled to be reimbursed by Plaintiffs for their costs in the amount of $_____, and reasonable attorney's fees in the amount of $_____.

DATED This 30th day of January, 1985.

Robert G. Newhouse
District Judge

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. 84250

Norman Gardner, et al,
Plaintiff,

v.

Lawrence Barnes, et al,
Defendant.

**MEMORANDUM DECISION AND ORDER**

Filed Jan. 18, 1985

Both the defendants and plaintiffs presented this Court with separate motions for summary judgment on the single issue of whether the Executive Director of the Idaho Commission for the Blind had the authority to dismiss the plaintiff, John Cheadle. This Court, after reviewing the Court file, determines and order to-wit:

Both the defendants and the plaintiffs have requested this Court to grant summary judgment in their favor on the issue of whether the Executive Director, Howard Barton, Jr., had the authority to dismiss the plaintiff John Cheadle from his employment at the Idaho Commission for the Blind. Both defendants and plaintiffs have argued that the Idaho Supreme Court case of Harry Ackerman, et al, vs. Idaho Department of Health and Welfare, 84 IFCR 417 (1984), along with Doe vs. Chang, 564 P. 2nd 1271 (Hawaii 1977), applies in this case. A review of these cases convinces this Court that the sole and remaining issue is whether the executive director had the authority to fire John Cheadle. The minutes to the Idaho Commission of the Blind board meeting of December 13, 1983, seems to indicate that the Executive Director had the authority to dismiss employees. The affidavits of Jack Ugaki and Lawrence Barnes,

filed September 28, 1984, shows this Court that the Executive Director had the actual authority to fire Mr. Cheadle. Since the plaintiffs have failed to show that Mr. Cheadle was not an exempt employee, or that his constitutional rights were violated, this Court believes that the defendants' motion for summary judgment should be granted.

This Court, after reviewing the memorandums, determines that defendants' motion for summary judgment is granted because the Court is of the opinion that the new Executive Director of the Blind Commission had the actual authority to pre exempt employees without cause. Plaintiff's cross motion for summary judgment is denied.

IT IS SO ORDERED. Counsel for the defendants is directed to prepare an appropriate judgment for the court's signature. Dated this 17th day of January, 1985.

ROBERT G. NEWHOUSE
District Judge

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. 84250

Norman Gardner, et al,
Plaintiffs,

vs.

Lawrence B. Barnes, et al,
Defendants.

**MEMORANDUM DECISION AND ORDER**

Filed 9:00 a.m. August 31, 1984

The defendants, Governor John V. Evans, Marty Peterson, Lawrence B. Barnes, Howard Barten, Jr. and Jack Ugaki, bring this motion for summary judgment on the grounds that the plaintiffs have failed to create a material issue of fact upon which a trial would be necessary. After giving extensive opportunities for discovery and to submit affidavits, and after additional time was given to submit additional briefs, this court determines and orders to-wit:

The defendants bring this motion for summary judgment based on the affidavits and depositions that have been filed in the record. The defendants contend that giving all inferences of fact and law to the plaintiffs, Ramona Walhof, John Cheadle and Norman Gardner, there exists no material issues of fact upon which a trial is necessary. A review of the plaintiffs complaint creates three different allegations that must be decided in order for summary judgment to be granted. The three allegations are whether there has been a violation of the open meeting law, the right to freedom of association, and the right to freedom of speech and press.

The first issue before this court is whether the defendants violated the open meeting statute. I.C. § 67-2340 through 67-2347 creates the open meeting law and the requirements thereunder. I.C. §67-2340 is the statute that created the open meeting requirement. I.C. 67-2347 requires that any actions that do not comply with open meeting statutes are null and void. The plaintiffs allege that the meeting in which Ramona Walhof was fired as executive director of the Idaho Commission of the Blind on February 3,1984, was in violation of the open meeting statutes and therefore the Board's action in dismissing Mrs. Walhof is invalid under I.C. 67-2347. The plaintiffs also believe the two commissioners who voted to fire the executive director went into the meeting already having made the determination and therefore the vote to fire her is also invalid. The first question before this court is whether the February 3, 1984 meeting which was held open to the public is in violation of the open meeting statutes. I.C. §§67-2343, 67-2344 and 67-2346 require that all meetings shall be open to the public, that notice of the meetings shall be given and that written minutes of the meetings shall be taken. A review of the court record shows clearly that the requirements of the open meeting act were adequately followed in the February 3, 1984 meeting. The board meeting had prior notice, minutes were taken and the meeting was open to the public. The next question is whether the board members are confined to those issues on the agenda. This court does not believe that the open meeting laws require only those items listed in the agenda to be the only items discussed. Therefore this court holds that the Idaho Commission for the Blind board meeting held on February 3, 1984 was not in violation of the open meeting act. The next issue is whether the conduct of the commissioners in the meeting is violative of the open meeting law. The plaintiffs allege that the two commissioners, Mr. Barnes and Mr. Ugaki, had conducted several illegal meetings in which they had made determinations that Ramona Walhof was to be fired. The Idaho Supreme Court in *State v. City of Hailey,* 102 Idaho 511, has held that where deliberations

that are in violation of the open meeting act have been done but that no firm and final decisions are rendered, then the taint of the illegal meetings will not taint actions subsequently taken where those actions were conscientiously considered at a valid open meeting. This court believes that private meetings that were held on February 2, 1984, and February 3, 1984, between Jack Ugaki and Larry Barnes, were in violation of the open meeting law, and any final determinations made in those meetings are null and void under I.C. 67-2347. Following the decision in *City of Hailey,* the question is whether the two commissioners, Barnes and Ugaki, went into the open meeting on February 3 having already made decisions in those prior illegal meetings. Mr. Barnes and Mr. Ugaki filed with this court on March 6, 1984 affidavits which both state that they had made no previous decision concerning the firing of Ramona Walhof until and during the meeting of February 3, 1984. Mr. Barnes in his affidavit states that it wasn't until Ramona Walhof refused in an executive session to resign that he decided to make the motion that she be discharged. This court believes that the affidavits clearly show that no final decision had been made on the dismissal of Ramona Walhof prior to the board meeting on February 3, 1984. As the Idaho Supreme Court stated in *Tristate National Bank v. Western Gateway Storage Company,* 92 Idaho 543:

> "rule 56 should be consciously evoked to the end that parties may always be afforded a trial where there is a bona fide dispute of fact. Summary judgment will be upheld when opposing affidavits are based only on 'unsupported suspicions.' "

This court has searched the court record in vain to find any support of the plaintiffs' allegations that commissioners Barnes and Ugaki had gone to the board meeting with definite plans to fire Ramona Walhof. Therefore this court determines that the regularly scheduled board meeting of the Idaho Commission for the Blind, held on February 3, 1984, was not in violation of the

Idaho open meeting act and the commissioners did not have a predetermined decision to fire the executive director prior to that meeting. Summary judgment is granted to the defendants on this issue.

The plaintiffs next allege that Ramona Walhof and John Cheadle were fired because of their expressions of speech, press and association. The plaintiff, Ramona Walhof, contends that her constitutionally protected right of freedom of speech and press were violated when she made critical remarks concerning the governor's attempt to remove the Blind Commission from his office. The plaintiff also contends that press releases and videos made with the Lieutenant Governor resulted in the Governor deciding to have the executive director of the Blind Commission fired. When alleging constitutional rights as grounds for opposing dismisal from work, a plaintiff needs to show a prima facie case that the protected conduct caused the dismissal. As the United States Supreme Court stated in *M.T. Healthy City Board of Education v. Doyle,* 97 S.Ct. 568, 429 U.S. 274,

> "Initially, in this case, the burden was properly placed upon the respondents to show his conduct was constitutionally protected, and that this conduct was a 'substantial factor' — or to put it in other words a 'motivating factor' in the board's decision not to rehire him."

The affidavits of Mr. Barnes and Mr. Ugaki, filed on March 6, 1984, deny that the governor's office brought pressure upon them to fire the executive director. The deposition of Mr. Barnes shows, on page 63, that the Governor's Office was only looking for an apology and did not want to be part of any resignation or firing. The Governor in his deposition denies that he or his office brought pressure on the commissioners to fire the executive director. This court after reviewing the record can find no direct link with the Governor's Office and the actions of the commissioners to fire the executive director.

Therefore this court believes that the plaintiffs have failed to show a prima facia case that constitutionally protected rights were violated by the dismissal of the executive director Ramona Walhof.

The plaintiffs next contend that their association with the National Federation of the Blind was a motivating and substantial factor in their dismissal. In a United States Supreme Court Case of *Branti v. Finkle,* 100 S.Ct. 1287, 445 U.S. 507, the Court stated:

> "To prevail in this type of an action, it was sufficient, as Elrod holds, for respondent to prove that they were discharged 'solely for the reasons that they were not affiliated with or sponsored by the Democratic party.' "

Again Mr. Ugaki and Mr. Barnes in their affidavits filed on March 6, 1984, state that their reason to fire Ramona Walhof was not because of her association with the National Federation of the Blind. The reasons given by Mr. Barnes and Mr. Ugaki, in the transcript of the meeting held on February 3, 1984, is that the executive director could not bring peace to the warring factions within the blind community. As stated earlier, mere allegations that are unsupported by fact will not stop summary judgment from being granted. This court, after reviewing the record, determines that the plaintiffs have failed to show a prima facia case that the plaintiffs' constitutionally rights of speech, press and association have been violated. Therefore summary judgment is granted to the defendants and against the plaintiffs on these issues.

Finally, this court looks at the individual plaintiffs in order to determine whether they have any remaining issues. The only connection this court can see with the plaintiff, Dr. Norman Gardner, is the fact that he was chairman of the board of the Idaho Commission for the Blind, and his only standing in the case is based upon the fact that he believed the illegal board vote had occurred. Since this court has determined that the open meeting law was not violated, Dr. Gardner has no standing to

continue in this case, therefore summary judgment is granted against him. The next plaintiff is Ramona Walhof, her grievances were on all three issues. Since this court believes that there was no violation of the open meeting law, and that the plaintiffs have failed to show a prima facia case of constitutional violations, summary judgment is granted against her. The last plaintiff is John Cheadle who was fired after the open meeting on February 3 by the new interim director. The defendants contend that since Mr. Cheadle's position was an exempt position, under the Idaho statutes there is no requirement that cause for dismissal exist. Since this court has held that the open meeting law was not violated, summary judgment would normally be granted against Mr. Cheadle, but this court believes an issue of fact exists as to whether the new executive director, Howard Barton, Jr., had the authority to dismiss Mr. Cheadle. In the December 13, 1983 board meeting, there is a discussion that the executive director was not to fire any further persons until given approval by the members of the board. In the court record there are no facts that show approval of Mr. Cheadle's firing had been given. Therefore summary judgment will not be granted against Mr. Cheadle on the sole issue of whether the executive director had the proper authority in which to fire Mr. Cheadle. Summary judgment is granted on all other issues.

This court after reviewing the affidavits and depositions, along with briefs filed by both parties, grants summary judgment to the defendants against Dr. Norman Gardner and Ramona Walhof. Summary judgment orally brought by the plaintiffs is denied. This court denies summary judgment against John Cheadle because a material issue of fact exists as to whether he was properly fired by the new executive director. All other issues in the motion for summary judgment brought by defendants against Mr. Cheadle are granted.

IT IS SO ORDERED.

Dated this 30th day of August, 1984.

ROBERT G. NEWHOUSE
District Judge

**REMARKS OF MR. MAURER**
**(May 12, 1984)**

**[129]** THE COURT: Very well. The record will so note the stipulation. I gather, with that stipulation, that the motion to admit newly-discovered evidence, then, will be withdrawn at this time.

That leaves us two motions.

MR. SPINK: I believe that motion would be granted, Your Honor.

THE COURT: Very well. The record will note that it is granted. And I suspect then that the plaintiffs should prepare an appropriate order for the court's signature.

We do have the motion to compel discovery and the motion to clarify order, then. And I gather, they are your motions, whichever one of you gentlemen cares to proceed, you will may do so.

MR. MAURER: Thank you, Your Honor.

The record in this case indicates that there are essentially three claims before the court. One claim is based upon constitutional principles and is based upon 42 USC 1983. And one is based on Section 504 of the Rehabilitation Act Codified at 29 USC 794. And one is based on the open-meeting law for the State of Idaho.

Now, the Honorable John Evans was noticed for his deposition and moved to have the notice quashed. In moving to quash that notice for deposition, the Honorable...

[R. 215] SERVICE (1980) ("Court's Power On Motion For Summary Judgment to Enter Judgment Against Movant"); and Note, "The Property Of Rendering A Summary Judgment In Favor Of A Non-Movant Under Wyoming and Federal Rules of Civil Procedure," 19 WY L.J. 65 (1964))

In addition to the use of summary judgment as a two edge sword, there are two additional theories upon which summary judgment in favor of Mr. Cheadle could be granted here. An oral motion for summary judgment, such as that of counsel at the hearing of March 12, 1984, was held sufficient in *Tripp v. May,* 189 F.2d 198 (7th Cir. 1951). Summary judgment has also been granted against the movant when, as here, the non-movant joined in the request for summary disposition. (*Commercial Credit Corp. v. California Ship Building,* 71 F.Supp. 96 (S.D. Ca. 1947)) There would be no prejudice to Defendants for granting summary judgment in favor of Plaintiff Cheadle since Defendants' Counsel was put on notice of the request at the March 12 hearing.

## VI.

### Summary Judgment Against Plaintiff Gardner Is Improper

Summary judgment against Dr. Gardner is improper because he was unlawfully excluded by the Defendants from participation in the affairs of the Idaho Commission for the Blind of which he is the Chairman. There is evidence tending to show that Dr. Gardner was excluded from meaningful participation in the conduct of the Commission by the Defendants for at least two (2) reasons which cannot survive judicial scrutiny. First, the evidency suggest that Defendants excluded Dr. Gardner from his unlawful role in Commission decision-making because of his Constitutionally protected associational activities. (Ugaki

**[R. 216]** Dep. 39-41, 76, 78; Barnes Dep. 56-57, 59-65; *See Keyishian v. Bd. of Regents, supra* and *NAACP v. Alabama, supra.,)* Second, it suggests that Dr. Gardner and Mrs. Walhof (both of whom are blind) were excluded from the deliberation of Defendants (all of whom are sighted) because of their blindness and in violation of Section 504 of the Rehabilitation Act of 1973 as amended (29 U.S.C. Section 794). (*See Consolidated Rail Corp. v. Darrone,* ____ U.S. ____, 52 U.S.L.W. 4301 (U.S. Feb. 28, 1984))

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**REMARKS OF MR. LeCLERCQ**
**(March 12, 1984)**

**[98]** statement disparaging to Mr. Barton or anybody else. But he did feel strongly enough about what was happening in the agency to express his views. And as a result of that, he was summarily discharged.

Now, it's true that he is an exempt employee under Idaho law. On the other hand, these cases which I have cited establish that even though the employment tenure of an individual may be such that that individual can be dismissed without cause, that there is no basis for firing anybody because they have engaged in protected rights of speech or association.

Now, just one or two more things in response to some of the arguments made by opposing counsel. Counsel have suggested that the first reference to 42 USC, Sections 1983, -85 and -88 appeared in the brief, that they were not before this court because they were not pleaded.

And we would submit that, assuming that Idaho follows modified federal rules pleading, notice pleading, that there is sufficient notice here, and if that should not be Idaho practice, we are quite willing to present the court with a motion to receive these claims by way of a second amended complaint.

I think this court can properly take notice that at the front end of litigation, the parties know **[99]** less about the dispute than at any other time, and during the course of the discovery process, other issues became apparent. We certainly — as of Friday, of this last week, the defendants are on notice that relief is being sought under 1983, 1985 and 1988.

Now, on the spot advertisement, counsel for defendants said that there was no formal reprimand. And thus, there is no constitutional claim.

There was no formal reprimand for Ms. Walhof's issuance of the press release. But this court can take notice that in the political scene when those in authority want to get at you, they very rarely proceed formally. They very often proceed informally and behind the scenes.

We think we have shown a sufficient connection here between the speech and association activities of the plaintiffs, and between their discharge, to prevail in this litigation.

And we do indeed think that there is basis here in these depositions to support a claim that the governor's office had something to do about the charge.

I have already cited to Mr. Ugaki's deposition on that point. We think that's also adequately borne out in Mr. Barnes' deposition and in Mr. Barton's deposition.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

(Filed February 24, 1984)

CASE No. 84250

NORMAN GARDNER, Chairman of the Idaho Commission for the Blind, both individually and in his official capacity representing himself and representing the Idaho Commission for the Blind whose home address is 8265 Valley View Drive, Boise, Idaho, 83704, IDAHO COMMISSION FOR THE BLIND, 341 W. Washington, Boise, Idaho, 83702; RAMONA WALHOF, individually and in her capacity as Director of the Idaho Commission for the Blind, 342 West Washington, Boise, Idaho 83702; JOHN A. CHEADLE, individually and in his capacity as Deputy Director of the Idaho Commission for the Blind, 6018 Bay, Boise, Idaho 83704,

*Plaintiffs,*

vs.

JOHN V. EVANS, GOVERNOR of the STATE OF IDAHO, individually and in his capacity as the CHIEF EXECUTIVE of the STATE OF IDAHO

MARTY PETERSON, DIRECTOR, Division of Financial Management Office of the Governor, individually and in his capacity as Director of the Division of Financial Management, LAWRENCE B. BARNES, individuall and in his capacity as a member of the Board of the Idaho Commission for the Blind, 5120 Sorrento Drive, Boise, Idaho, 83704; JACK UGAKI, individually and in his capacity as a Member of the Board of the Idaho Commission for the Blind, 265 Cascase, Idaho Falls, Idaho 83401; and HOWARD H. BARTON, Jr., individually, 2605 Utter, Boise, Idaho 83706,

*Defendants.*

**AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

THE Plaintiffs come before this Court and for their cause of action state:

1. The Plaintiff, NORMAN GARDNER, is a member of the Board of the IDAHO COMMISSION FOR THE BLIND, who serves as Chairman of that Board.

2. The Plaintiff, THE IDAHO COMMISSION FOR THE BLIND, is a statutorily created agent of the government in the State of Idaho.

3. The Plaintiff, RAMONA WALHOF, is the Director of the IDAHO COMMISSION FOR THE BLIND, who became the Director on September 28, 1982 and has served in that capacity since that time.

4. The Plaintiff, JOHN CHEADLE, is an employee of the IDAHO COMMISSION FOR THE BLIND serving as Deputy Director of that agency.

5. The Defendant, John V. Evans is a resident of Idaho and serves as the Chief Executive Officer for the State of Idaho.

6. The Defendant, Marty Peterson is a resident of Idaho and serves as Director of the Division of Financial Management in the Office of the Governor of the State of Idaho.

7. The Defendants, JACK UGAKI and LAWRENCE B. BARNES, are members of the IDAHO COMMISSION FOR THE BLIND.

8. THE DEFENDANT, HOWARD BARTON, JR., is a resident of the State of Idaho and purports to be the Director of the IDAHO COMMISSION FOR THE BLIND.

## COUNT I
## VIOLATION OF OPEN MEETING LAW

9. On or about February , 1984, the Defendants, JACK UGAKI and LAWRENCE B. BARNES, met in an executive session of the IDAHO COMMISSION FOR THE BLIND, with the Chairman of the IDAHO COMMISSION FOR THE BLIND, NORMAN GARDNER. At that time, JACK UGAKI and LAWRENCE B. BARNES announced a decision which had previously been made by them to have Mrs. RAMONA WALHOF, Director of the IDAHO COMMISSION FOR THE BLIND, removed from that position. The facts and circumstances surrounding this meeting demonstrate clearly that LAWRENCE B. BARNES and JACK UGAKI had met privately in an unannounced, unnoticed, secret meeting to discuss the dismissal of Mrs. WALHOF as Director of the IDAHO COMMISSION FOR THE BLIND and decided at that time that she should be dismissed. This decision was made without giving notice to the public as required by the Open Meeting Law, codified at the Idaho Code, Sections 67-2340 to 67-2347. Furthermore, this decision was made without notice to all of the members of the Board of the IDAHO COMMISSION FOR THE BLIND. Specifically, NORMAN GARDNER, the Chairman of the IDAHO COMMISSION FOR THE BLIND, did not have an opportunity to participate in the discussions surrounding this decision.

10. The Defendants, JACK UGAKI and LAWRENCE B. BARNES, purported to act on behalf of the IDAHO COMMISSION FOR THE BLIND in making their decision to dismiss Mrs. WALHOF, in a secret, unannounced meeting. After making this unlawful decision, these two members of the IDAHO COMMISSION FOR THE BLIND purported to employ HOWARD BARTON as Director of the IDAHO COMMISSION FOR THE BLIND.

11. In taking this action which purportedly dismissed Mrs. WALHOF as Director of the IDAHO COMMISSION FOR

THE BLIND, JACK UGAKI and LAWRENCE B. BARNES did not state reasons for the dismissal of Mrs. WALHOF. In fact, the only comments to be offered by members of the Board of the IDAHO COMMISSION FOR THE BLIND regarding this dismissal which related to the program of the IDAHO COMMISSION FOR THE BLIND were supportive and positive.

12. After taking this action which purportedly dismissed Mrs. WALHOF from the IDAHO COMMISSION FOR THE BLIND, which action was taken without authority and in a manner contrary to the Open Meeting Law, Mr. BARNES and Mr. UGAKI purported to install HOWARD BARTON as temporary Directory of the IDAHO COMMISSION FOR THE BLIND. This action was also taken wihtout authority inasmuch as the decision to take this action had been made in an unannounced, secret meeting. Furthermore, there had been no notice of a decision to consider the employment of HOWARD BARTON, and Mr. BARNES and Mr. UGAKI illegaly prevented and excluded the Chairman of the IDAHO COMMISSION FOR THE BLIND, NORMAN GARDNER, from attending and participating in a meeting to discuss this matter.

13. Inasmuch as the action taken to employ HOWARD BARTON as Director of the IDAHO COMMISSION FOR THE BLIND was taken in a manner not in compliance with the laws in the State of Idaho and taken without authority, this action is null and void pursuant to Idaho Code, Section 67-2347.

14. Shortly after his purported employment as Director of the IDAHO COMMISSION FOR THE BLIND, HOWARD BARTON purportedly dismissed JOHN CHEADLE, the Deputy Director of the IDAHO COMMISSION FOR THE BLIND from this position. Inasmuch as HOWARD BARTON, has not been legally employed by the State of Idaho to direct the IDAHO COMMISSION FOR THE BLIND, he has no authority to take actions on behalf of that agency. Consequently, the

actions he took which purported to dismiss JOHN CHEADLE from his position as Deputy Director of the IDAHO COMMISSION FOR THE BLIND are null and void.

15. In purportedly dismissing JOHN CHEADLE as Deputy Director of the IDAHO COMMISSION FOR THE BLIND, no reasons were stated for the dismissal and no cause was given. Indeed, there was not sufficient cause to dismiss JOHN CHEADLE from his position as Deputy Director of the IDAHO COMMISSION FOR THE BLIND.

16. In his purported capacity as Director of the IDAHO COMMISSION FOR THE BLIND, HOWARD BARTON is acting to deprive RAMONA WALHOF of her right to direct the programs of the IDAHO COMMISSION FOR THE BLIND; NORMAN GARDNER of his right to serve as Chairman of the IDAHO COMMISSION FOR THE BLIND; JOHN CHEADLE of his right to serve as the Deputy Director of the IDAHO COMMISSION FOR THE BLIND; and the IDAHO COMMISSION FOR THE BLIND of having the uninterrupted and peaceful services of the Chairman of the Board, its Director, and its Deputy director, all in violation of Idaho Code Sections 67-5401 to 67-5413.

17. The actions of JACK UGAKI and LAWRENCE B. BARNES with respect to the IDAHO COMMISSION FOR THE BLIND taken on February 3, 1984 were not authorized or sanctioned by statute and were in violation of the statutes of the State of Idaho. As such, they are not actions taken by an agency of the State of Idaho and are actions of private individuals. The actions of JACK UGAKI, LAWRENCE B. BARNES, and HOWARD H. BARTON have damaged NORMAN GARDNER, the IDAHO COMMISSION FOR THE BLIND, RAMONA WALHOF, and JOHN CHEADLE in their capacity to provide the services which they are expected to provide under Idaho law and in their reputations. The Plaintiffs estimate the amount of this damage to exceed the amount of five hundred thousand dollars ($500,000.00).

## COUNT II
## CONSTITUTIONAL VIOLATIONS

18. The Plaintiffs reallege the allegations contained in paragraphs 1 through 17 above.

19. In purportedly dismissing RAMONA WALHOF and JOHN CHEADLE and in illegally preventing and excluding NORMAN GARDNER from attending and participating in a meeting to discuss these matters, the Defendants took concerted action based on the fact that Mrs. WALHOF, Mr. CHEADLE, and Mr. GARDNER are members of the NATIONAL FEDERATION OF THE BLIND. Such action would not have been taken if Mrs. WALHOF, Mr. CHEADLE and Mr. GARDNER were not members of the NATIONAL FEDERATION OF THE BLIND. The actions taken against these Plaintiffs by the Defendants were purportedly actions on behalf of the State of Idaho. As such, these actions constitute violations of the individual Plaintiffs' right to freedom of expression and freedom of association guaranteed by the First Amendment to the Constitution of the United States, as made applicable to the states by the Fourteenth Amendment.

20. The actions of the Defendants are punitive in nature and have had a chilling effect upon the right of Mrs. WALHOF, Mr. CHEADLE, and Mr. GARDNER to associate with other persons who are members of the NATIONAL FEDERATION OF THE BLIND and to exercise along with others, their First Amendment rights of free expression and free association.

21. The purported dismissals of Mrs. WALHOF and Mr. CHEADLE from their respective positions at the IDAHO COMMISSION FOR THE BLIND were entirely without cause and were effected without the due process of law required by the Fourteenth Amendment to the Constitution of the United States.

22. The actions of the Defendants, and each of them, to enforce punitive measures against Mrs. WALHOF, Mr. CHEADLE, and Mr. GARDNER for exercising their rights of free expression and free association were purportedly taken as public officials and on behalf of the State of Idaho. These actions have deprived Mrs. WALHOF, Mr. CHEADLE, and Mr. GARDNER of liberty and property interests without due process of law, and have damaged Mrs. WALHOF, Mr. CHEADLE, and Mr. GARDNER in an amount estimated to exceed five hundred thousand dollars ($500,000.00).

**COUNT III**
**VIOLATIONS OF FREE SPEECH AND PRESS**

23. The Plaintiffs reallege paragraphs 1 through 22 as they were specifically set forth in this count of the complaint.

24. The Defendants, and each of them, joined in concerted action to deprive the Plaintiffs of their First Amendment rights to the freedom of speech and of the press by first threatening the Plaintiffs if they exercised that right and by taking action to affect the dismissal from employment of Mrs. Ramona Walhof and Mr. John Cheadle.

25. The actions of the Defendants, and each of them, have caused a chilling effect upon the right of the Plaintiffs to exercise their rights of freedom of speech and of the press.

26. The Plaintiffs have been damaged by the actions of the Defendants, and each of them, in an amount estimated to exceed five hundred thousand dollars ($500,000.00).

**PRAYER FOR RELIEF**

WHEREFORE: The Plaintiffs demand:

(a) Judgment against the Defendants in the amount of five hundred thousand dollars ($500,000.00).

(b) A declaratory ruling by the Court that the actions taken by the Defendants were contrary to the Open Meeting law and pursuant to the Idaho Code, Section 67-2347 are null and void.

(c) A permanent injunction from this Court enjoining and restraining the Defendants from placing or attempting to place HOWARD BARTON in office as Director of the IDAHO COMMISSION FOR THE BLIND in violation of Constitutional provisions and Idaho law.

(d) An Order from this Court enjoining and restraining the Defendants from any and all further violations of the Open Meetings law particularly from holding any further meetings which have not been noticed to all members of the IDAHO COMMISSION FOR THE BLIND and to the general public and in which the subjects for discussion at the meetings had not been previously announced as required by the open Meetings laws, Idaho Code Section 67-2343 and Idaho Code Section 67-2345.

(e) A permanent injunction restraining the Defendants from taking any action to deprive the Plaintiffs of their right to exercise their Constitutional rights of free speech and of free press.

(f) Such other and further relief as the nature of this cause requires.

**DEMAND FOR TRIAL BY JURY**

The Plaintiffs demand a trial by jury of twelve on all matters. The Plaintiffs are not willing to stipulate to a jury of less than twelve (12) at this time.

RESPECTFULLY SUBMITTED this 23rd day of February, 1984.

/s/ Marc Maurer, Esquire
Counsel for Plaintiffs

## APPENDIX B

October 22, 1982

Honorable Governor John Evans
The State of Idaho
Statehouse
Boise, Idaho 83702

Dear Governor Evans:

This letter is to protest and question the hiring procedures followed in the hiring of Ramona Walhof as Administrator of The Idaho Commission for the Blind.

On September 21, 1982, Mr. Howard Barton, in executive session, gave notice that he was resigning as Administrator, effective December 31, 1982, to the 3 member Board of Directors for the Commission.

At that time, as stated in the official minutes of that executive session, the Board asked the Administrator to draw together information for an announcement for the Administrator's position. It would be reviewed with Board members and sent out the first part of October. The members would meet November 11, 1982, to review the applications and set a date for interviews.

These dictates were never carried out. On September 28, 1982, Mrs. Walhof from Baltimore, Maryland met with 2 Board members; the third and very objective member of the Board was out of the country and unable to attend. Mrs. Walhof was hired at that same meeting. It was decided that Mrs. Walhof would receive the same salary that the current Administrator was receiving after seven (7) years as Administrator at the Idaho Commission for the Blind.

There are several unanswered questions involved in this hiring that make the entire procedure suspect. Why weren't the procedures set forth by the Board on September 21, 1982, follow-

ed? It seems, according to the Board minutes of September 28, 1982, Mrs. Walhof was the only person interviewed for the position. This very quick and secretive action is highly questionable, as no announcement for the position was ever posted, especially since there are several highly qualified persons in Idaho and already employed by the Commission who were not given the chance or opportunity to apply if they so desired.

Since the budget for the up-coming fiscal year had already been prepared and submitted to the Idaho Legislature, again the question should be raised as to the secrecy, speed and unethical action of this hiring.

During the meeting of September 28, 1982, there was no person present to take the minutes of the proceedings. The minutes were dictated to Mr. Howard Barton by Dr. Norman Gardner after the meeting, again leaving the motives and actions of the 2 Board members suspect.

As a consumer of the Idaho Commission for the Blind, I believe that the Administrator's paramount duty is to insure that the most complete and knowledgable services available are provided to the agency's consumers. This Administrator, therefore, is directly accountable to those consumers, regardless of the consumers' beliefs and organizational affiliations.

The Board of Directors has a responsibility to find the most qualified and capable person to fill the position of Administrator. Without interviewing the many people who are qualified to fill this position, the Board members involved have not fulfilled their obligation to the blind consumers of this state. Their actions and motives should be closely examined, and a search for the most qualified Administrator should be initiated.

Brian K. Wardle

B. K. Wardle
814 North Wilson
Boise, Idaho 83706

cc: The Idaho Statesman

## INDEPENDENT BLIND OF IDAHO

### PURPOSE

The purpose of the Independent Blind of Idaho is to provide assistance that is not available elsewhere to the blind and visually impaired of Idaho and exercise the role of adviser to government agencies and service providers that have an impact on services to the blind. In order to assure that the needs of all blind are heard, we the Independent Blind of Idaho will not support domination of any agency by any one consumer organization.

[I.B.I. Constitution and By-Laws, Art. II attached to Jones Dep.]

Dear Legislator:

We hope this brief letter clarifies the matter of who is legally designated to provide services to the blind of Idaho and who speaks for the blind here in Idaho.

The Commission for the Blind, located at 341 West Washington, Boise, Idaho is a state and federally funded rehabilitation agency designated by Idaho state law to provide services to the blind in our state. There are a number of organizations in Idaho composed of individuals who are blind and those interested in programs for the blind. Through such organizations as the Independent Blind of Idaho, the Treasure Valley Association of the Blind, the National Federation of the Blind, the American Council for the Blind, the Idaho Coalition of Citizens with Law Vision and others, the blind of Idaho seek to make their views known. None of these groups are state or federally funded organizations.

We are members of the Independent Blind of Idaho, the newest and fastest growing organization of the blind in our state. The stated purpose of our organization is: The purpose of the Independent Blind of Idaho is to provide assistance that is not available elsewhere to the blind and visually impaired of Idaho and exercise the role of adviser to government agencies and service providers that have an impact on services to the blind. In order to assure that the needs of all blind are heard, we the Independent Blind of Idaho will not support domination of any agency by any one consumer organization. The Independent Blind of Idaho is an *Idaho* organization founded because of our growing concern that one organization, the National Federation of the Blind, whose national headquarters is in Baltimore, Maryland, was gaining complete dominance of the State agency.

We hope this letter helps clarify the problem some people have of confusing the State agency with organizations of the blind. *They are not the same.*

If you have any questions about the subject of this letter or any other concerns about services for the blind in Idaho, please contact us.

Sincerely,

Brian Wardle
President
Independent Blind of Idaho
343-3775

**"I.B.I.'s Ten Points"**

1. Over 50 of the staff have quit or been terminated since Mrs. Walhof became administrator sixteen months ago. *13 out of 24 positions.*

2. Those in administrative positions are all members of The National Federation of the Blind of Idaho:

   a. **Chairman of Commission Board** -is N.F.B. President of Idaho Chapter and member of the National N.F.B. Board.

   b. **Administrator** -N.F.B. - hired from N.F.B. Headquarters in Baltimore, Md.

   c. **Deputy Administrator** -N.F.B. - wife is editor of N.F.B. publication.

   d. **Chief of Orientation** -N.F.B. - Officer N.F.B.

   e. **Chief of Field Services** -N.F.B. - Officer N.F.B.

   Additionally, the N.F.B. holds its monthly meetings in the Commission building and other organizations of the blind are discouraged from doing so.

3. How many blind individuals of those served by the Agency actually received *rehabilitation services* versus Talking Book Machines, Radio Reading Services, etc?

   How many were *rehabilitated* and what kind of *employment?*

   The administrator has refused to provide the President of Independent Blind of Idaho with this information when requested.

4. What is the purpose of the "Services for the Blind" organization?

Although the President of the N.F.B. claims that organization is headquartered in his home we have evidence which indicates "Services for the Blind" uses the Commission for the Blind as a business address and letters are signed by the Administrator as Executive Director of that organization.

Officers of the organization are the N.F.B. President and Commission Board Chairman, the Deputy Administrator and one other staff person of the Commission.

5. Intimidation is such that anyone working overtime is fearful of reporting these hours on appropriate documents.

6. Shortly after Mrs. Walhof became Administrator four staff members; the Chief of Field Services, Vending Stand Supervisor, Accountant, and Job Placement Specialist expressed concerns to the Commission Board about Mrs. Walhof's administrative practices. Since then the Chief of Field Services and the Vending Stand Supervisor have been fired and the Accountant quit because of intimidation. The Job Placement Specialist is continually threatened and interestingly enough is the only blind person of these four.

   At the time these four spoke to the Board about problems, two other staff members were called in to speak to the Commission Board to counter the charges. They have both received meritorious raises and have been promoted.

7. When did the agency begin involving clients financially in their rehabilitation programs?

   The Agency was instructed to do so when appropriations were set last year.

   What documentation exists?

   We believe this practice was only recently started.

8. How many out of state clients are taking training at the orientation center?

Last year Representative Neibaur asked this question and Mrs. Walhof's reply was "A couple during the past 10 years." This statement is certainly false.

Have these individuals paid for their training?

This was also requested of the Agency when appropriations were made last year.

9. The Administrator continually misuses proper procedures for hiring and dismissal. Announcements for positions are manipulated in such a way that only those Mrs. Walhof wishes to consider for positions are made aware of an announcement.

10. The dismissed Chief of Field Services won his grievance hearing conducted by the Personnel Commission. At this hearing it was determined that there were no grounds for his dismissal. Mrs. Walhof offered and paid him a cash settlement of $11,000.00.

What services suffered as a result of Mrs. Walhof's refusal to rehire him?

What category of expenditure did these funds come from?

**STATE OF IDAHO**
**COMMISSION FOR THE BLIND**

STATEHOUSE
BOISE, IDAHO 83720
(208) 334-3220

December 9, 1983

The Honorable John V. Evans
Governor, State of Idaho
Statehouse
Boide, ID 83720

Dear Governor Evans:

I am in receipt of a copy of the Executive Summary "The Structure of State Government in Idaho—A Report from the Council on the Economy and Governmental Organization". I note with grave concern the following recommendation: "Office on Aging, Commission for the Blind, and Disability Determinations Unit—Transfer to the Department of Health and Human Services. (This is a Council-recommended name change from the existing Department of Health and Welfare. This rename will, in the opinion of the Council, more accurately reflect the entire scope and role of this Department.)" I feel compelled to share with you the dangers and results of such a reorganization.

1. Several members (perhaps a majority) of the Executive Reorganization Council have expressed to me concern that the Commission for the Blind should not be included in the Department of Health and Welfare (or Human Services) and should not be combined in the same division with Vocational Rehabilitation and the Disability Determinations Unit. I was shocked to read that this is a council recommendation, since it appears to be a minority view, and many members of the council were absent yesterday when the draft report was considered.

2. Work with the blind is a very specialized process, and it is recognized as such by federal law. The Rehabilitation Act pro-

vides that each state must offer vocational rehabilitation services to handicapped individuals, and states may separate out programs for the blind because of the nature of the help needed. More and more states are establishing separate agencies for the blind. Experience has shown that this is the best way to provide the help needed. Last year Washington State did a thorough study to determine whether another structure would be better than a commission for the blind. The conclusion was that a separate commission for the blind is best. Arkansas created a new separate department for the blind. It does not follow that many tiny departments will be needed to serve the handicapped. Programs for the blind are unique. The fear associated with blindness, the uniqueness of the techniques taught, the dramatic nature of the changes brought about in blind persons all require more specialization and different approaches than work with other handicapped groups. Experience in Idaho has shown this to be true. I can share with you many materials which back up these statements, including a position statement from the National Council of State Agencies for the Blind, the Washington State report, statements by organizations of the blind, etc.

3. Proposals are often made for the purpose of saving money and doing good in the world. Some have claimed that reorganizing the Commission for the Blind will do both. In reality, it would do the opposite of both. Large departments require more paperwork, more supervision, and more money to operate than small ones, unless the activities within the department compliment each other. We must be careful not to commit arson in the name of trash-burning. Making a transition—any transition—in the structure of government costs money initially. Fitting a small program in with large ones will continue to cost money. Another layer of bureaucracy and paperwork must inevitably be added to accomplish the necessary coordination. This problem is worse when most of the persons in the large department have little or no knowledge about the small program as would be the case if the Commission for the Blind were to be placed in a large department. It would

cost money, and it could destroy programs for the blind. There is no question that help for the blind would be reduced unless a great deal more money were made available.

4. There are those who believe that the Commission for the Blind should not be located within the Governor's Office and that that is why a change has been recommended. They are correct. The Commission for the Blind should not be located within the Governor's Office. No governor nor governor's staff is likely to have the expertise needed to provide appropriate help to the blind. The Commission for the Blind should be a separate department as it was in Idaho from 1967 until 1974. Not surprisingly, this was also the period when the Idaho Commission for the Blind was at its best. The Commission for the Blind has no quarrel with this Governor, or any other governor, but you are not and are not expected to be a professional in work for the blind. The Governor and Legislature correctly decided in 1967 that programs for the blind could best be provided by a separate Commission for the Blind. In 1974 they again correctly decided that: If a separate agency could not be maintained, then the Commission for the Blind should be placed within the Governor's Office. Nothing has changed. If change from the current status is to be made, the Commission for the Blind should again become a separate program. If this is not possible, the next best place is within the Executive Office. There is no other place in State government where the Commission for the Blind can function as it must to provide the help it knows how to give—help which is desperately needed by the blind throughout the State. The Board of the Commission for the Blind is currently appointed by the Governor and confirmed by the Senate. The Board has the responsibility to hire an administrator. This is a good structure and need not be changed. It gives the Governor input when he wants it, and it gives the blind of Idaho the opportunity to raise concerns with the Board or the Governor if they find the need to do so. If the Board or the Administrator is not responsive to the needs of the blind and the taxpayers of Idaho, they can and should be replaced. The

present Administrator and Board do not want it any other way. If the services provided are adequate or good within the limits of the resources available, the Commission can and will receive support from the majority of the blind of the state, elected officials, and taxpayers.

Six persons become blind in Idaho each week. Let us not deprive these people of the help provided by the Commission for the Blind, and let us not diminish the help that is now available. Let us maintain the status of the Commission for the Blind as it now is. We must find a way to maintain the Commission for the Blind in a separate status which works best, as has been demonstrated in many states, including Idaho.

Very truly yours,

(Mrs.) Ramona Walhof
Administrator

RW:cls

**STATE OF IDAHO**
**COMMISSION FOR THE BLIND**

STATEHOUSE
BOISE, IDAHO 83720
(208) 334-3220

January 5, 1984

FOR IMMEDIATE RELEASE

CONTACT: Ramona Walhof
334-3220

## GOVERNOR TO RECOMMEND COMMISSION FOR THE BLIND BE ABOLISHED

Governor Evans announced in his office yesterday (according to Mrs. Ramona Walhof, Director of the Idaho Commission for the Blind) that that he intends to recommend that the Commission for the Blind be submerged in the Department of Health and Welfare to be renamed the Department of Health and Human Services. Present at the meeting besides the Governor and Mrs. Walhof were Marty Peterson, head of the Division of Financial Management; Jeff Shann, analyst in the Division of Financial Management; Pat Vaughan, Chief of Staff in the office of the Governor; and John Cheadle, Deputy Director of the Commission for the Blind.

Walhof said that the blind of the State will do all in their power to resist such a reorganization which would destroy the kind of help blind people are now receiving. Services for the blind were administered by the Department of Public Assistance prior to 1967 when the Commission for the Blind was created. Walhof said that many blind people still remember the deplorable situation that existed then.

"I do not believe that the Legislature and other government officials will tolerate such a change, and I really believe the

Governor does not understand what it would do to the blind," Walhof said. "The blind are an emerging minority who are just learning to handle their own affairs. We don't always agree 100% on what is best, but all the blind do agree that without a Commission for the Blind, our opportunities are fewer by far."

Governor Evans told Walhof that the recommendation was first made by the Executive Reorganization Council. Walhof says that the majority of the members of the council told her either that they were opposed to the idea or that they didn't have enough data to make a decision. Many indicated that the opinions of heads of the agencies involved would be important in making any such decision. The Commission for the Blind was not consulted by the Division of Financial Management about this matter until yesterday.

Programs for the blind are handled by separate agencies in most states, and Federal law provides that only services for the blind may be separated out from general rehabilitation programs. Walhof says that the trend is toward more separate programs for the blind, not fewer. She provided to the Governor letters from the heads of the Oregon Commission for the Blind and the Washington Commission for the Blind, both stating why separate commissions for the blind are important. Walhof also gave the Governor a policy statement from the National Council of State Administrators for the Blind stating that programs for the blind are best handled separate from other departments.

The Idaho Statesman January 6, 1984

# Director: Plan imperils services to blind

By MICHAEL ZUZEL
The Idaho Statesman

A proposal to transfer control of the Idaho Commission for the Blind from the governor's office to the proposed department of health and human services would destroy the commission's ability to provide services, commission Director Ramona Walhof said Thursday.

"It's one of the worst recommendations I've ever seen," Walhof said. "I don't think there would be anything to gain by it. It would cost money and I don't think we could offer the same level of service."

But Martin Peterson, head of the state's Division of Financial Management, rejected Walhof's contention that the proposed transfer would effectively "abolish" the commission.

"The governor has a commitment to the blind in the state, but he also has a commitment to efficiency and productivity," Peterson said.

Created in 1967, the commission offers instruction, counseling and vocational programs throughout the state, Walhof said. The agency is staffed by the equivalent of 29 full-time employees, and Walhof said 1,175 people are expected to make use of commission services in the coming year, she said.

In the early 1970s, Peterson said, the governor's office became "a catchall for a lot of miscellaneous activities," including the Commission for the Blind and several other unrelated agencies.

"The problem was that the governor's office was never set up to handle a wide spectrum of functions," Peterson said.

Last summer, Gov. John Evans appointed a 13-member panel to study ways of reorganizing state government to encourage economic growth and streamline agency functions. The commission recommended that the name of the Department of Health and Welfare be changed to the department of health and human services, and that it assume responsibility for the Commission for the Blind, the Disability Determinations Unit and the Office on Aging from the governor's office.

Walhof said the move would force programs for the blind to compete with other department programs for funds — a situation that she said would result in a decline in services within three to five years.

The commission would be placed into a division with the Disability Determinations Unit and the Division of Vocational Rehabilitation — three agencies that "don't belong together," Walhof said.

Peterson, however, believes that the proposed move would be beneficial both financially and in terms of services. The commission's state allocation — $676,000 this year — would not be affected, he said.

"I think we're looking at this from a very practical standpoint," Peterson said. "I would say there probably isn't an agency or department in state government that wouldn't like to be outside, operating independently."

Walhof predicted the state's blind "will do all in their power to resist such a reorganization."

"I think (Evans) is going to get a lot of feedback," she said. "I don't believe the Legislature will make a move that all the blind people in the state oppose."

BEST AVAILABLE COPY

# Governor halts panel for blind transfer plan

Statesman News Services

Gov. John Evans said Wednesday he will abandon plans to integrate the state Commission for the Blind into the Department of Health and Welfare.

"There was such a hue and cry within the blind community — they were afraid they would lose their identity," Evans said. "I was convinced by the members of the Blind Commission that we should maintain the integrity of the Blind Commission," he said.

The Commission for the Blind, created in 1967, provides instruction, counseling and vocational programs throughout the state. The agency is staffed by the equivalent of 29 full-time employees and expects to serve 1,175 people this year, Commission Director Ramona Walhof said.

A governor's task force on reorganization of state government last summer proposed turning the Department of Health and Welfare into the department of health and human services. The Commission for the Blind was to become part of the new agency.

Walhof said Wednesday she was pleased with the governor's decision. "I am thrilled, and blind people are, too," she said.

Walhof said she worked hard to keep the commission independent and "didn't think the governor would do something against the wishes of the blind people in the state."

January 12, 1984



BEST AVA

January 31, 1984

Mr. Larry Barnes
1401 Shoreline Dr.
Boise, ID 83706

Dear Mr. Barnes:

We know that you have been contacted by some blind people in this state who are complaining about the dismissal of Scott Fenwick and/or other problems in the vending facility program. We are also aware that a few of them have been fighting Mrs. Walhof since she arrived in Idaho. As you know, some of these people have been troublemakers in a variety of ways both before and after Mrs. Walhof arrived here. In spite of this, Mrs. Walhof has repeatedly required all staff members to give fair services to all blind people including those who have been the most unfair to her. In fifteen short months, she has succeeded in uniting the majority of the staff into a hard-working, committed and optimistic team. It is hard to believe how far we have come. At a time of limited funds, we have learned to take advantage of more resources outside the Commission for the Blind, and services have improved. Furthermore, the public awareness of what the Commission does for the blind has increased in a most exciting way.

Since we know you have received numerous complaints, we want to be sure you also know how very good most of the staff and most of the clients we deal with believe the new changes are. This letter need not be long. We are counting on you to help and support Mrs. Walhof. Thank you.

Tony Gage
Elsie Boyd
Carol Schneider
Charles R. Martin
John E. Bragonier
Don Duffy
Mary E. Smith
Elaine Campbell
Mary Evelyn Smith
Shirley J. Spencer
Shirley Duffy
David D. Duffy

EX NO. Barnes
DATE 3-20-84
BURNHAM, MARL & ASSOCIATES

ILABLE COPY

Mr. Larry Barnes
January 31, 1984
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Barbara Cleadle
Karna Herman
Marie Manchester
Bill Morgan
Lynda Morgan
Debra Smith
Jacky Smith by BC.
Kenny Price
Judy Burnett
Ellen Sellars
Larry Sellars
Annabelle Alexander by BC

BEST AVAILABLE COPY

Mr. Chairman, Members of the Board — I came here, as most of you know, about a year ago. I came here specifically so I could work with Mrs. Walhof and the blind of this state to develop programs in this state that I believe have potential, still believe they have potential to become [among] the best programs in the Nation. I [have known] ... Mrs. Walhof for a number of years. I have also worked in other agencies for the blind, agencies which I believe were good agencies. The promise for independence for [the] blind is at stake. It is at stake here right now. There is no question about that in my mind. I [once] worked [in another state] for a Director who had a good positive philosophy about blindness, but did not have the ability to work within the system and make that philosophy, that dream for blind people a reality. There was no hope after a few years in that agency, and it died, withered away. I worked in an umbrella agency in the State of Missouri where there were 7 steps between the agency Director and the Governor. It's like being in prison, you can't do a thing. By the time ... [what] you want done gets through the system and back to you there is no philosophy to be laid [sic] anywhere. It is passed around the bureaucracy. The blind in the State of Idaho have been wandering and looking for the dream and the promise since the Commission was created in 1967. We are like moses' children here. We know it is possible, we know it has been done, but this strong evidence has never been in Idaho. We are at the river, we are ready to cross. Mrs. Walhof is our Joshua. We've not been there, she has come closer to bringing the dream of blind people to fruition than anyone else in this state. I admire her ability as a director, her ability as an administrator, her ability to have real compassion and real love for blind people. I work hard at my job, she works harder at hers. I have been in early in the morning. She is up before I a.m. I see her at work at 5 a.m., I've seen her at work past midnight. I know she believes in the ability of blind people, I know that she has the capacity to help the blind in this state fulfill their dream of independence. I believe that the action of of the Board, today, will determine

that future; whether it occurs in the near future or the distant future is up to the Board now. I believe that a vote to dismiss Mrs. Walhof would render this agency into utter [chaos] .... We know that there are desires in state government to move this agency into Health & Welfare or someplace else. We need someone with her strength and ability to prevent that. That is something that has occurred, occurred and occurred and we came very close this year and Mrs. Walhof was able to prevent it. We know that there have been problems for years and years and years. We know that the people who bring this action today who have fought with Mr. Ugaki and Mr. Barnes [in the past and] have been doing the same sorts of things for years and years and years. The issue is not Mrs. Walhof. The issue here is not Mrs. Walhof's leadership; the issue here today is whether or not those people who for whatever reason have been dissatisfied or angry, probably about their own blindness, wish to bring this point to order. [sic] i will not continue to work in an agency that offers no hope for the blind people. If Mrs. Walhof goes I will go and I suspect that a good number of the staff currently working for this agency will also resign. APPLAUSE — APPLAUSE.

R. 220-21.

**STATE OF IDAHO**
**COMMISSION FOR THE BLIND**

STATEHOUSE
BOISE, IDAHO 83720
(208) 334-3220

February 3, 1984

Mr. John A. Cheadle:

Effective immediately, February 3, 1984, at 5 p.m., you are relieved of your duties as Deputy Administrator and placed on administrative leave with pay for ten days. At the end of those ten days you are dismissed.

As an employee on administrative leave with pay you are still an employee under administrative control. Therefore, you are instructed to remove all of your personal items from your office. Further, all keys, credit cards and equipment you have which are property of the Commission for the Blind will be turned over to my representative no later than 5 p.m. today. You are not to interfere in any way with the day to day business of the agency. Specifically, you are not to visit classrooms, training or administrative areas of the building without the Administrator's permission.

Failure to comply with these orders will result in your immediate dismissal, termination from payroll, and removal from the building.

Howard H. Barton, Jr.
Acting-Administrator
Idaho Commission for the Blind

HHB:eb

BEST AVAILA



2/5/84 12:20 PM as I begin up to the
Lam building John Cheadle, Apts. enters
the basement area. I was checking the
building to determine if anything appeared out
of place

(Cont)

Also at 1:30 PM Bob called to tell me
that Walter ~~Ring~~ had called to complain
me at 1 PM today at Grace to clean
entry. I informed Bob of this situation
and he ~~asked~~ told me not to go to
the building. ~~I have~~ This action made
it difficult to get the grass raked out.

1 P.M. talked to Pat Vaughn and he
advised me not to talk to Seamen.

Show up monday keep occupied with
state Business plan complete if unable
as appropriate. Were working agency
100%.

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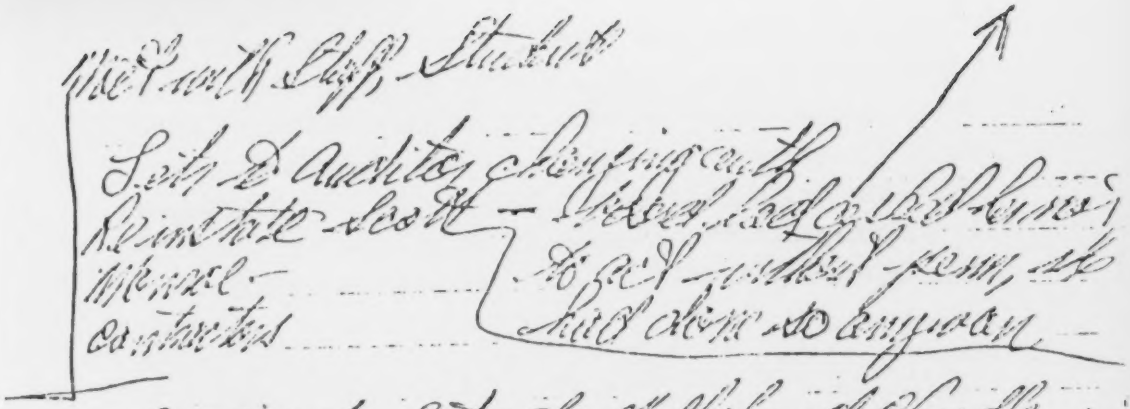

The Idaho Commission for the Blind is charged with providing services and programs for the blind in Idaho. Any reorganization effort that would impact the operation of those programs is of concern to the Commission. Of equal concern, however, are recent statements by the Commission's executive director Ramona Walhof, in which she missrepresented Governor Evans as advocating the elimination of the Commission.

The Commission does have concerns about the recommendation of the Council on Economy and Governmental Organization to make the Commission a Division of the Department of Health and Welfare. However, the Commission is also aware of the strong support of Governor Evans for programs for the blind, including his request for a 35-percent increase in state funding for the Commission for the Blind in fiscal 1985.

Mrs. Walhof falsely stated that Governor Evans has recommended that the Commission be abolished. The Commission believes that Mrs. Walhof knowingly missrepresented the Governor's position and has asked her to retract the statement and issue a formal apology to the Governor.

## APPENDIX C

## IDAHO APPELLATE RULES

**Rule 38. Opinions and remittiturs.** — (a) Opinions. The filing of an opinion of the Court shall be the announcement of the opinion. A certified copy of the opinion filed in an appeal or proceeding shall be mailed forthwith by the Clerk of the Surpeme Court to the clerk of the district court or administrative agency from which the appeal was taken and copies of the opinion shall be mailed to each party in the appeal or proceeding and to the presiding district judge or chairman of the administrative agency.

(b) Finality of Opinons. Opinions shall become final 21 days after the date of the last of the following events:

(1) The announcement of the opinion;

(2) The announcement of the opinion on rehearing;

(3) The announcement of a modified opinion without a rehearing.

(c) Remittiturs. When the opinion filed has become final in accordance with this rule, the Clerk of the Supreme Court shall issue and file a remittitur with the district court or administrative agency appealed from and mail copies to all parties to the appeal and to the presiding district judge or chairman of the agency. The remittitur shall advise the district court or administrative agency that the opinion has become final and that the district court or administrative agency shall forthwith comply with the directive of the opinion.

(d) Costs and Attorneys Fees. The taxation of costs and attorneys fees, if any, shall be included in the remittitur if the same have been determined, but the issuance of the remittitur shall not be delayed if the taxation of such items has not been determined. [Adopted March 25, 1977, effective July 1, 1977.]

## APPENDIX D

**United States Constitution**

AMENDMENT I [1791]

Congress shall make no law ... abridging the freedom of speech ... or the right of the people peaceably to assemble ....

AMENDMENT XIV [1868]

SECTION 1 .... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Federal Statutes**

**29 U.S.C. § 794**

No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

**42 U.S.C. § 1983**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other pro-

per proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

**42 U.S.C. § 1985**

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators. R.S. § 1980.

**34 C.F.R. § 104.4 Discrimination prohibited.**

(a) *General.* No qualified handicapped person shall on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from Federal financial assistance.

(b) *Discriminatory actions prohibited* (1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual licensing, or other arrangement, on the basis of handicap:

... (vi) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service....

(4) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discriminate on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to handicapped persons, or (iii) that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State.

Supreme Court, U.S.
FILED
NOV 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-417 (2)

In The
# Supreme Court of the United States
October Term, 1986

Norman Gardner, Ramona Walhof, John Cheadle,
*Petitioners,*

vs.

John V. Evans, Marty Peterson, Lawrence W. Barnes, Jack Ugaki, Howard Barton,
*Respondents.*

## BRIEF IN OPPOSITION TO CERTIORARI TO THE SUPREME COURT FOR THE STATE OF IDAHO

MICHAEL T. SPINK
CLEMONS, COSHO & HUMPHREY, P.A.
700 West Idaho Street, Suite 1110
Boise, Idaho 83702
(208) 344-7811
*Counsel of Record for Respondents*

November 12, 1986

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

12pp

## QUESTIONS PRESENTED

Petitioners' Statement of Questions Presented does not accurately relate to the issues presented to, and resolved by, the Idaho Supreme Court, and does not reflect the arguments presented as reasons for granting the writ.

All of the issues decided by the State Supreme Court flow from the termination by the Idaho Commission for the Blind (hereinafter I.C.B.), of its executive director and her assistant. The issues resolved by the state court were as follows:

1. Did the actions violate the Idaho Open Meetings Law, Idaho Code § 67-2340, *et seq.*?

2. Whether the actions violated Petitioners' freedom of association.

3. Whether the actions violated Petitioners' freedom of speech.

4. Whether Petitioners were denied procedural due process.

5. Whether the actions constituted a violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Supp. 1984).

6. The claim for defamation raised for the first time on appeal was dismissed, and Petitioners have not included this issue in the Petition.

## LIST OF PARTIES

Petitioners have accurately listed the parties with the exception of the assertion that Petitioner Norman Gardner acted representing the Idaho Commission for the Blind. Counsel for Respondents was appointed by the Attorney General of the State of Idaho as Special Deputy Attorney General for the Idaho Commission for the Blind and has officially represented that entity throughout the course of this litigation.

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No. 86-417

—o—

In The
# Supreme Court of the United States
October Term, 1986

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Norman Gardner, Ramona Walhof, John Cheadle,
*Petitioners,*

vs.

John V. Evans, Marty Peterson, Lawrence W. Barnes, Jack Ugaki, Howard Barton,
*Respondents.*

—o—

## BRIEF IN OPPOSITION TO CERTIORARI TO THE SUPREME COURT FOR THE STATE OF IDAHO

—o—

## OPINIONS BELOW

The Opinion of the Idaho Supreme Court may be found in Petitioners' Appendix commencing at A-6.

—o—

## STATUTES INVOLVED

The statutes involved in this case include those identified by Petitioners, and the Idaho Open Meetings Law, Idaho Code § 67-2340, *et seq.*

———o———

## STATEMENT OF THE CASE

Petitioners' Statement of the Case indicates in footnote No. 1 that a copy of all portions of the record relied on in the Petition have been lodged with the Clerk of the Supreme Court of the United States. Petitioners make substantial factual assertions by reference to various depositions taken in the state court proceeding; however, counsel for Respondents has been informed on two occasions by the Clerk's office that these transcripts have not been filed with the Clerk of the United States Supreme Court. A substantially more accurate summary of the facts may be found in the Opinion of the Supreme Court of Idaho, found in Petitioners' Index, pp. A-6.1 —6.8.

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## SUMMARY OF ARGUMENT

1. This Petition for Writ of Certiorari has not been timely filed.

2. Petitioners, in essence, are asking the United States Supreme Court to act as a finder of fact. They do not substantively challenge the Idaho Supreme Court's

application of either Idaho law, federal law, or the Federal Constitution. They have not identified to the Court the types of reasons for granting a petition for writ of certiorari contemplated by Rule 17, Rules of the Supreme Court of the United States.

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## ARGUMENT

### I. THIS PETITION HAS NOT BEEN TIMELY FILED IN ACCORDANCE WITH RULE 20, RULES OF THE SUPREME COURT OF THE UNITED STATES.

Petitioners have incorrectly characterized the Opinion of the Idaho Supreme Court as a memorandum opinion. The Opinion, which is the judgment of the state supreme court, was issued on May 22, 1986. Petitioners' Appendix, p. A-6. Rule 24.4, Rules of the Supreme Court of the United States, provides that the 90-day limit for filing of a petition for certiorari commences from the date the judgment or decree sought to be reviewed is rendered, "and not from the date of the issuance of the mandate (or its equivalent under local practice)." Rule 38, Idaho Appellate Rules, provides that a remittitur, "shall advise the district court or administrative agency that the opinion has become final and that the district court or administrative agency shall forthwith comply with the directive of the opinion." Petitioners' Appendix, p. A-55. The Idaho remittitur is clearly the date of issuance of the mandate contemplated by Rule 20.4. Rules of the Supreme Court of the United States. The Petition was filed on September 11, 1986, more than 90 days after entry of the Judgment on May 22, 1986. *See* Petitioners' Appendix, p. A-6.

## II. THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR THIS COURT TO GRANT CERTIORARI.

The character of reasons which govern review on certiorari are described in Rule 17, Rules of the Supreme Court of the United States. Under a broad reading of this rule, Petitioners should have identified a conflict between the decision of the Idaho Supreme Court and a prior decision of this Court, another state court, or a federal court of appeals. They have not. Nor have Petitioners identified an important question of federal law resolved by the Idaho Supreme Court, which had not yet been decided by the United States Supreme Court.

While the decision to grant certiorari is wholly discretionary with the U.S. Supreme Court, it should not be granted except in cases where the principles involved are of the parties involved. *Rice v. Sioux City Memorial Parks Cemetery*, 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed.2d 897 (1955). The questions addressed by Petitioners do not relate to blind people as a general class, but rather to the specific employment interests of the two individuals.

The Petition essentially asks the United States Supreme Court to assume the role of fact-finder, and fails to recognize the facts as reflected by the record and recited by the Idaho Supreme Court in its decision. This is a procedural necessity as the case was resolved by the trial court on a motion for summary judgment. The issues presented by Petitioners rest largely on a determination of Idaho state law and affect only the employment interest of two individuals. The significance of these distinctions may be seen in the brief examination of Petitioners' specific argument which follows.

**A. The Idaho Supreme Court Did Not Refuse to Extend 42 U.S.C. Section 1985(3) to Members of a Constitutionally Protected Association or to Members of a Congressionally Protected Class of Blind Persons, and Did Not Refuse to Grant Judicial Protection to the Claims for Freedoms of Speech and Association.**

The initial case before the District Court of the Fourth Judicial District of the State of Idaho, was resolved on summary judgment only after Petitioners were offered extensive opportunities for discovery. Petitioners' Appendix, p. A-12. The trial court, and the Idaho Supreme Court, carefully reviewed Petitioners' assertion that the actions of Respondents had violated their freedoms of association and speech. The Idaho State Supreme Court specifically analyzed these assertions based upon the complete factual record, and the applicable case law of the United States Supreme Court. See Petitioners' Appendix, pp. A-6.8—6.17. In response to these arguments, the Idaho court analyzed the facts in terms of *Mt. Healthy City School Dist. Bd. of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). Accordingly, Petitioners had to show that the speech and association rights were a substantial factor in their discharge, and also that the protected speech affected matters of public concern. Petitioners' unsupported reconstruction of the facts cannot alter the record before the state court, and does not alter the fact that the state supreme court applied the current case law of the United States Supreme Court to the facts of the case.

**B. Section 504 of the Rehabilitation Act of 1963 Was Properly Applied by the State Supreme Court.**

The Idaho Supreme Court's analysis of this issue is found in Petitioners' Appendix, pp. A-6.21—6.23. Again,

the Idaho Supreme Court specifically applied current federal law to the facts of the case. The court found that a plaintiff must establish the following four elements to succeed on a claim under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Supp. 1984): (1) that he or she is handicapped; (2) that he or she is otherwise qualified for the position sought; (3) that he or she has been discriminated against solely by reason of the handicap; and (4) that the position exists as part of a program or activity receiving federal financial assistance.

The Idaho Supreme Court found that neither petitioner had created even a factual question with respect to the third requirement—that Walhof and Cheadle had been dismissed solely because of their handicap. Petitioners' own allegations make this conclusion inescapable. The Rehabilitation Act claim had been added to the pleadings as an afterthought, and the claim was inconsistent with the primary assertion that they had been dismissed either because of speeches made, or because of their membership in the National Federation of the Blind.

## III. PETITIONERS DO NOT RAISE A SPECIAL OR IMPORTANT DUE PROCESS CLAIM.

Petitioners again allege nothing more than simple disagreement with the facts reflected by the record and the decision of the Idaho Supreme Court. The state supreme court addressed the due process question at Petitioners' Appendix, pp. A-6.17—6.21. Walhof and Cheadle were "at will" employees under Idaho state law. The state court properly applied *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), and determined that there was no property interest in continued employ-

ment to which Walhof and Cheadle could claim entitlement. This is a matter of state law that is not in conflict with any federal decision or law and does not create a special or important reason for granting certiorari.

———o———

## CONCLUSION

The Court should refuse to grant Petitioners' Petition for Certiorari because: (1) it was not timely filed, and (2) no special or important questions of federal law are raised by the Idaho Supreme Court Decision.

Respectfully submitted,

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FILED
NOV 25 1986
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CLERK

(3)

No. 86-417

# In the Supreme Court of the United States

OCTOBER TERM, 1986

NORMAN GARDNER, RAMONA WALHOF, JOHN CHEADLE,

*Petitioners,*

VS.

JOHN V. EVANS, MARTY PETERSON, LAWRENCE W. BARNES, JACK UGAKI, HOWARD BARTON,

*Respondents.*

## REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI TO THE SUPREME COURT FOR THE STATE OF IDAHO

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## I. THE PETITION FOR CERTIORARI WAS TIMELY FILED

Respondents argue that certiorari should not be granted because the petition was not timely filed. Respondents' argument is without merit for three reasons.

First, the Idaho Rules of Appellate Procedure provide in cases such as the one *sub judice* that "[o]pinions shall become final 21 days after . . . [t]he announcement of the opinion." IDAHO R. APP. P. 38(b)(1) at A. 55. The remittitur issues "[w]hen the opinion filed has become final in accordance with this rule." IDAHO R. APP. P. 38(c) at A. 55. Rule 38 of the Idaho Rules of Appellate Procedure is in accord with the representation made to Mr. Le Clercq in June 1986 by the Office of the Clerk of the Idaho Supreme Court. Petition for Certiorari at 2. Moreover, the past unambiguous holdings of the Idaho Supreme Court and statements by its members make clear that the entry of the remittitur by the Idaho Supreme Court constitutes its final judgment. *See*, for example, *Farber v. State*, 106 Idaho 677 at 680 n.1, 682 P.2d 630 (1984) (Justice Bistline, concurring, stated that it had been his "impression over the last eight years" as a justice that an Idaho Supreme Court decision was not "a final judgment . . . [until] the remittitur had issued."[1] As this Court observed in *N.A.A.C.P. v. Alabama*, 357

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[1]*Accord, Ross v. Ross*, 103 Idaho 406 at 417, 648 P.2d 1119 (1982) (Bistline, J., concurring and dissenting on other grounds) ("until such an appeal is disposed of and upon remittitur, the case does indeed fall into limbo"); *id.* at 103 Idaho 419 n.3 (Bakes, C.J., dissenting on other grounds); *Jensen v. Doherty*, 101 Idaho 910 at 911, 623 P.2d 1287 (1981) (Bistline, J., dissent-

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U.S. 449, 457-58 (1958): "Novelty in procedural requirements cannot be permitted to thwart review in this Court

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ing on other grounds) ("If not appealed from the judgment would have gained res judicata effect which it also will have on the remittitur."); *Hutchins v. State,* 100 Idaho 661 at 665, 603 P.2d 995 (1979) ("When the cause was back in trial court after remittitur. . . ."); *State v. Scroggins,* 110 Idaho 380, 716 P.2d 1152 (1985) (the power of the Supreme Court to recall its remittitur to further consider its earlier judgment); *State v. Blevins,* 108 Idaho 239 at 244, 692 P.2d 1174 (district judge directed to modify its judgment upon receiving remittitur); *State v. Hoak,* 107 Idaho 742 at 751, 692 P.2d 1174 (1984) (Judge Bistline concurring and dissenting on other grounds); ("after the remittitur went down"); *Steiner v. Amalgamated Sugar Co.,* 106 Idaho 111 at 115, 675 P.2d 826 (1984) ("Upon remittitur, we direct the trial court to modify its judgment. . . ."); *State v. Bylama,* 103 Idaho 473 at 475, 648 P.2d 1119 ("This rule allows the sentencing judge to reduce a sentence within 120 days after receipt of the remittitur affirming the judgment"); *Kifer v. School District,* 100 Idaho 411 at 412, 599 P.2d 302 (1979) (Shepard, J., dissenting on other grounds) ("I am at a loss to understand the posture which this case will assume on the issuance of this Court's remittitur"); *State v. One 1955 Willy Jeep,* 100 Idaho 150 at 157, 595 P.2d 299 (1979) (Bistline, J., dissenting on other grounds), (" 'Defendants now prosecute this appeal from the judgment of the superior court entered pursuant to the remittitur of the District Court of Appeal' "); *State v. Adams,* 99 Idaho 75 at 86, 577 P.2d 1123 (1978) (". . . upon the remittitur going down . . . the 120 day retention of jurisdiction becom[es] an effective part of the sentence"); *Avondale Irrigation Dist. v. North Idaho Properties,* 96 Idaho 1 at 5, 523 P.2d 818 (1974) ("If there is no motion to reopen within thirty days after the remittitur issues herein, the judgment of the district court shall be in all respects final"); *Martin Estate v. Woods,* 94 Idaho 870 at 871, 499 P.2d 569 (1972) ("On appeal to this court, the district court dismissal was reversed and the cause remanded for trial. . . ." Following trial on the merits, after remittitur . . ."); *Berry v. District Court,* 91 Idaho 600 at 603, 428 P.2d 519 (1967) (Smith, J., joined by Taylor, J., dissenting on other grounds) ("On remittitur, the district court entered findings of facts"); *Darrar v. Joseph,* 91 Idaho 210 at 214, 419 P.2d 211 (1966) ("Any further orders . . . will be made by the district court, after remittitur herein"); *Minidoka County v. Krieger,* 88 Idaho 395 at 418, 399 P.2d 962 (1965) ("reasonable attorney fees on the appeals to be incoroprated upon remittitur").

applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." Justice Holmes once said: "Whatever springes the State may set for those who are endeavoring to assert rights the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis v. Wechsler,* 263 U.S. 22, 24 (1923).

Whatever inroads may have been made on the final judgment rule of 28 U.S.C. § 1257 to *permit* reviewability of federal questions,[2] Rule 20.4 of the Rules of the Supreme Court, if fairly construed in accordance with the finality rule of 28 U.S.C. § 1257, must not *deny* review of federal questions on entry by the state court of its final judgment — in this case the entry of the remittitur on June 13, 1986.

Second, the efficiency and federalism interests which underlie the final judgment rule of 28 U.S.C. § 1257 are not compromised by permitting review in this case. The "want of harmony" of Supreme Court decisions with respect to the final judgment rule results from the "varying forms in which state courts have expressed their action." *Norfolk & S. Turnpike Co. v. Virginia,* 225 U.S. 264, 268 (1912). The "want of harmony" among decisions of this Court due to the "varying forms" of state expression reflects the deference this Court owes to the principles of federalism. It would be especially cruel to reject for want of timeliness a petition involving substantial federal claims (rejected out of hand by the state courts) because

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[2]See, e.g., Frank, "Requim for The Final Judgment Rule," 45 Texas L. Rev. 292 (1966).

out of state counsel counted the ninety days within which the petition must be filed in reliance on 28 U.S.C. § 1257; Idaho Appellate Rule 38(b) and representations by the Office of the Clerk of the Idaho Supreme Court that, under Idaho practice, the entry of the remittitur on June 13, 1986 constituted the final judgment.

Third, for the Court to reject this petition for lack of timeliness would be inconsistent with the literal language of 28 U.S.C. § 1257 and with the strong federal policy favoring federal review of substantial federal questions litigated in the state courts.

Rule 58(b) of the Federal Rules of Civil Procedure was modified several years ago to require that "[e]very judgment shall be set forth in a separate document." This was "done mainly to clarify and make certain what should be treated as a judgment and . . . in order to eliminate confusion." 6A MOORE'S FEDERAL PRACTICE § 58.01 at 58-4 (1986) Idaho appellate courts set forth their final judgments in a separate document styled a remittitur. IDAHO APP. R. 38(c). The same important federal polices which led to the amendment of Federal Rule 38 mitigate strongly in favor of the Court's acceptance of the petition as timely filed.

Counsel for respondents sought and obtained extensions of time in this proceeding from both the Idaho Supreme Court and the United States Supreme Court. In neither instance, did petitioners object to the extension.[3]

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[3]This is not the first attempt of respondents to prevent petitioners from being heard on the merits of important issues in the case. Respondents consistently characterized petitioners' fed-

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Many thousands of dollars have been spent on discovery, pre-trial motions and appeal of this case. Both the Idaho district court and the Idaho Supreme Court made short shrift of petitioners' federal claims. Petitioners in good faith and in accord with 28 U.S.C. § 1257 and Idaho practice, relied on and counted the ninety days within which their time for filing the petition commenced to run from June 13, 1986 when the remittitur was filed. The issues presented in this case are too important to the individual petitioners and to the blind people of Idaho and the United States to pretermit petitioners' only mode of federal review of their substantial federal claims. Respondents' timeliness objection should be rejected and the petition for certiorari granted. The remittitur in this case is the same type of judgment the Court found to be within the scope of its review in *Puget Sound Power & Light Co. v. King County*, 264 U.S. 22, 24-25 (1924).

The disposition of the timeliness defense urged here accords with the important fact that most lawyers seek re-

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eral claims as "frivolous" in the state courts and sought an award of attorney fees on that basis. Respondents contended that petitioners "did not timely file objections to costs and attorney's fees and therefore waived all rights to object." Memorandum Opinion and Order of District Court filed May 31, 1985 at R. 350-51. The District Court held that respondents' petition for fees was "prematurely filed." *Id.* at 351. Counsel for respondents also attempted to prevent petitioners from being heard in the early stages of this litigation by serving notices only on *local* counsel without service on out-of-state counsel responsible for the prosecution of the litigation. *See* affidavit of Marc Maurer of September 19, 1984 par. 8 at R. 312-13. Subsequently, counsel for respondents scheduled a hearing for a protective order against further discovery without notice to out-of-state counsel. *Id.* at par. 9.

view of cases in the United States Supreme Court only several times in their professional lives. A construction by this Court of its rules which is widely at variance with the language of § 1257 or which attributes a radically different meaning to finality than that of the state court from which review is sought compromises standards of reasonable predictability under § 1257 and constitutes a Draconian hazard for the practicing lawyers whom this Court serves. *Cf. Henry v. Mississippi*, 379 U.S. 443 (1965).

For the Court to decline certiorari for want of timelinesss would intrude heavily on the federalism interests of § 1257 and the strong federal policy against piecemeal review. The construction of Rule 20.4 sought by respondents would require counsel in states with final judgment rules similar to that of Idaho[4] to file protective petitions to adverse opinions in advance of final judgment to avoid the harsh prospect that failure to do so may preclude review entirely.

This Court should reject the lack of timeliness argument of respondents or, alternatively, grant certiorari and

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[4]*See*, e.g., *Garrett v. Garrett*, 30 Colo. App. 167, 505 P.2d 39 at 40 (1971) (Appellate rule that mandate of Court of Appeals shall issue 15 days after entry of judgment is intended to establish finality); *O.P. Corp. v. North Palm Beach*, 302 So.2d 130 (Fla. 1974) (issuance of mandate constitutes final judgment of appellate court); *Borrow v. El Dorado Lodge Inc.*, 75 Az. 218, 254 P.2d 1027 at 1028 (1953) ("The original opinion of this court did nothing more than affirm the orders of the trial court. . . . [T]he time for performance . . . commences to run from the time the appellate court's judgment or order becomes effective, viz. under our practice, the date of the issuance of the mandate.") A preliminary review of the cases suggest that this problem could occur in several states.

reserve the jurisdictional issue for briefing and argument on plenary consideration of this case.[5]

Respectfully Submitted,

Frederic S. Le Clercq
Attorney for Petitioners

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[5]Counsel did not lodge a copy of the portions of the record on which petitioners relied, Petition for Certiorari 2 n.1, nor request certification of the record by the Clerk, because of the policy against such requests prior to the grant of certiorari. U.S. Supreme Court Rule 19.1.